/323.44W570>C1/

31484
Whipple

St. Procopius
College Library
LISLE, ILL.

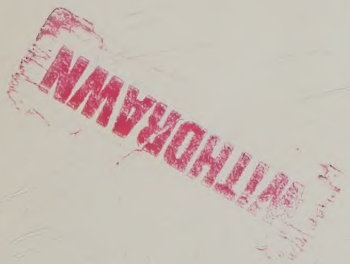
All borrowers are expected to
acquaint themselves with the library
regulations printed on book marks,
which may be obtained at the cir-
culation desk.

Our Ancient Liberties

OUR ANCIENT LIBERTIES

The Story of the Origin and Meaning of Civil and Religious Liberty in the United States

BY
LEON WHIPPLE, M.A.
Assistant Professor of Journalism in New York University and formerly Director of the Courses in Journalism in the University of Virginia



NEW YORK
THE H. W. WILSON COMPANY
1927

323.44
W57o

Published July 1927
Printed in the United States of America

31484

FEB 14

To
MARGARET HUBBARD
Who Loved Liberty

Digitized by the Internet Archive
in 2025

https://archive.org/details/ourancientlibert0000leon

PREFACE

Americans do not always know just what they mean when on the Fourth of July and other patriotic occasions, they praise "our ancient liberties." Yet the striking curtailment of civil liberty in the United States since 1917 makes it important that when we appeal to the "liberties of our Forefathers," we know exactly what we mean and what they meant. What were these liberties? Where did they come from? What were they worth in practice?

To answer these questions is the purpose of this study. It is a primer for inquiring Americans on the foundations of their civil and religious rights. No such simple definition of these rights has been written, partly because liberty was taken for granted like the air, or because it was a technical matter for law-books. Now we find it must be kept handy for everybody, like an ax, edged with understanding.

When we talk of our traditional liberties, we rarely worry about when we got them; but I have assumed that *American* liberties could not have existed before the first states in 1776, and that they were pretty completely defined by 1791 when the national Bill of Rights was added to the Constitution. Since then, the words of the guarantees have not changed, and only the Civil War amendments have been added.

Naturally, the Forefathers did not create liberty in those fifteen years between 1776 and 1791. It had evolved through history, become self-conscious in England and America, and must be interpreted through its origins. The first part of this study, therefore, contains

some historical light on these origins, and on the backgrounds of the constitutional guarantees. The second part defines one by one the principal guarantees as they were understood both by the popular and by the legal mind of 1791.

This is not, however, a legal treatise. Liberty admittedly does not reside in laws, nor is it preserved by courts. Yet the ordinary citizen is so neglectful of the protection of his own liberties that the legal profession almost alone concerns itself with their interpretation. This is unfortunate—for lawyers are not commonly lovers of liberty. On the other hand, the slogans of agitators and the speculations of libertarian philosophers offer no very certain guide to truth. For these eloquent defenders of liberty interpret it in their own terms and for their own purposes and are as apt to exaggerate the claims to liberty for special classes as are the lawyers to argue that liberty must never endanger the status quo. Few there are who advocate liberty as a law of social change to be enforced for all men equally.

I have tried to preserve that perilous balance between liberty and the existence of government. Civil liberty is here shown to be the only sure guarantee of orderly progress for a democracy at the same time it is shown to have had a class origin, and to have failed over and over again in practice, its failures being often enough the work of its advocates. The volume will help to give the plain citizen of the United States some idea of what his liberties are, and offer a guide so that he may the more wisely and fearlessly claim them as he moves about the business of his life and soul.

New York University — Leon Whipple

July 1, 1927

CONTENTS

			Page
Preface			vii
Introduction, by Julian W. Mack, Judge of the United States Circuit Court			1
Chapter	I.	Civil Liberty Defined	7
Chapter	II.	English Origins	17
Chapter	III.	American Contributions	23
Chapter	IV.	The Bills of Rights	37
Chapter	V.	Ideals Underlying the Constitution	53
Chapter	VI.	Religious Liberty	63
Chapter	VII.	Freedom of Speech and of the Press	79
Chapter	VIII.	Freedom of Assembly and Right of Petition	101
Chapter	IX.	Rights Concerning the Militia	107
Chapter	X.	The Right to Law	115
Chapter	XI.	Protection Against Charges of Treason	125
Chapter	XII.	The Right to Change the Constitution	129
Chapter	XIII.	Conclusion	135
Index			151

INTRODUCTION

This book should appeal to all those who love liberty and wish to preserve its practice. In small compass and simple style, it is a study of the origin and meaning of the constitutional guarantees of liberty embodied in our Bills of Rights, the first ten amendments to the Constitution of the United States. No other volume presents so briefly and yet so clearly the basic conceptions of those ancient liberties, that men too often talk about glibly but do not observe in times of test. The book is scholarly, but not technical or pedantic.

The conflict of the individual with the state is the essence of one of the chief modern problems of government; and that problem becomes daily more urgent in the face of new instruments for the control of public opinion, of increasing regimentation of the mass mind, and of deeper penetration by the state, especially in time of war, into the very life of the individual. This study of the roots of our liberties is particularly timely in this post war era with its newer tendencies to increasing restrictions and to punishing for the tendency of men's words rather than for any clear, serious and present danger of an overt act incited by the words. But while this volume restates the principles of constitutional liberty, it neither adventures on any novel interpretation of the old liberties nor advocates strange new ones. The inherited liberties as here defined will suffice, if each generation but enforces them.

If there be any lack in the author's presentation, it is in giving a picture of liberty drawn from the charters

and words of the Founders without giving the proof of their fidelity to liberty in their deeds. There is perhaps over much dependence on the documentary rationalization of active forces that can be understood only by a profounder study of political and economic backgrounds. The author has limited himself to presenting a brilliant picture of certain aspirations of the people and of the recorded formulas by which the leaders of 1776-1791 sought to persuade them that the liberty for which they had fought, was secured. The forces of self-interest in politics and economics, and of personal bias for or against certain institutions and ways of life, all need deeper study to give us a truer picture of what our liberties really meant when first proclaimed.

While constitutional guarantees often fail to protect genuine liberty in times of crisis, they stand as an ideal and a challenge; they are a guide-mark that will always show us how far we may be falling short of the ideal. The real service of this book will be to recall this ideal to the men and women of our own day: to teach them that civil liberty, woven as it is into our history, cannot be usurped as a rallying cry either by ultra-conservatives or ultra-radicals and that expressing the high hopes of past generations, it must be transmitted unimpaired from age to age by all who aim to serve their country and mankind.

The author is by descent and life excellently fitted for his task. He is a bred-in-the-bone American. His love for liberty is native-born; it is no different in kind from the love of liberty that led his kinsmen—Rutledge of South Carolina, Whipple of New England, Walton of Georgia—to sign the Declaration of Independence. It was inherited from pioneering individualists who, trekking from Virginia to Kentucky and then into Missouri, helped to win a continent as they moved. It was

refreshed by his years as student and teacher at the University of Virginia, founded by the great libertarian, Thomas Jefferson, whose "lengthened shadow" is still an inspiration to new generations. It has been disciplined by his teaching—in universities and as a journalist, so that by experience he is well grounded in the need for freedom of thought and freedom of the press. His liberalism is not doctrinnaire or pugnacious; it has not arisen primarily out of concern for the struggles of labor or desire to advocate new political faiths. It came rather out of a respect for the human soul and from the feeling that if men are to direct their own progress, they must have freedom to experiment and so to learn.

Who will find this book useful? To the historian it will furnish a short compendium of facts and references not easily available elsewhere. The younger student of American history and institutions will profit from so clear a statement of what men declared liberty to mean at the very moment that they were forming governments to preserve liberty. The lawyer and the judge may find here a ready reference from which to refresh their minds on matters that they at times are in danger of forgetting. The advocates of new causes will find here advice as to their rights. And minority groups may find what liberty they may demand and to what traditions they may appeal. Finally, the plain citizen will find in this book a source of new pride in the courage and vision of his ancestors, an avenue to knowledge which will help quiet any fear that liberty may be dangerous and a guide that may teach him to know when his fundamental rights are threatened.

Here is a dream of human freedom that the fathers wove into their Constitution, a dream that will be a reality if the American people heed the words of Mr. Justice Brandeis, from whose concurring opinion in

Whitney v. California U.S. Supreme Court, May 16, 1927, I quote:

Those who won our independence believed that the final end of the state was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.[1] They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to believe that the evil to be prevented is a serious one. Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it.[2] Condonation of a breach enhances

[1] Compare Thomas Jefferson: "We have nothing to fear from the demoralizing reasonings of some, if others are left free to demonstrate their errors and especially when the law stands ready to punish the first criminal act produced by the false reasonings; these are safer corrections than the conscience of the judge."—*Quoted by Charles A. Beard. Nation.* 123: 8. *July 7, 1926.* Also in first Inaugural Address: "If there be any among us who would wish to dissolve this union or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it."

[2] Compare Judge Learned Hand in Masses Publishing Co. v. Patten, 244 Fed. 535, 540; Judge Amidon in United States v. Fontana, Bull. Dept. Justice No. 148, p. 4-5; Chafee, *Freedom of Speech.* p. 45-56, 174.

the probability. Expressions of approval add to the probability. Propagation of the criminal state of mind by teaching syndicalism increases it. Advocacy of law-breaking heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.

Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom.[8] Such, in my opinion, is the command of the Constitution. It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it.

Moreover, even imminent danger cannot justify resort to prohibition of these functions essential to effective democracy, unless the evil apprehended is relatively serious. Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society. A police measure may be unconstitutional merely because the remedy, although effective as means of protection is unduly harsh or oppressive. Thus, a state might, in the exercise of its police power, make any trespass upon the land of another a crime, regardless of the results or of the intent or purpose of the trespasser. It might, also punish an attempt, a conspiracy, or an incitement to commit the trespass. But it is hardly conceivable that this Court would hold constitutional a statute which punished as a felony the mere

[8] Compare Z. Chafee, Jr., *Freedom of Speech.* p. 24-39, 207-21, 228, 262-5; H. J. Laski, *Grammar of Politics.* p. 120-1; Lord Justice Scrutton in Rex. v. Secretary for Home Affairs, Ex parte O'Brien, (1923) 2 K.B. 361, 382: "You really believe in freedom of speech, if you are willing to allow it to men whose opinions seem to you wrong and even dangerous; . . " Compare Warren, *The New Liberty Under the Fourteenth Amendment,* 39 Harvard Law Review, 431, 461.

voluntary assembly with a society formed to teach that pedestrians had the moral right to cross unenclosed, unposted, waste lands and to advocate their doing so, even if there was imminent danger that advocacy would lead to a trespass. The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the state. Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly.

JULIAN W. MACK,
Judge of the United States Circuit Court.

CHAPTER I

CIVIL LIBERTY DEFINED

A definition of civil liberty interpreted to form a substantial basis for the libertarian attempting to solve his problems is the purpose of this chapter. The discussion, therefore, keeps in mind the difficulties or problems of civil liberty which are in the main the following: Where shall the line be drawn between the rights of the human being and the powers of the State he has created? By whom shall this line be drawn? When and how shall it be changed to suit new times? How shall we tell what is liberty and what is license? How can we protect the unpopular minority which history so often has proved to be right? In short, can human society direct its own progress self-consciously by accepting at once the innovations of its social discoverers, or must it continue to make martyrs of them until the blind force of life brings about the very changes they advocate, willy-nilly?

The idea of civil liberty has been expressed by Lieber as:

> That liberty which plainly results from the application of the general idea of freedom . . . to the civil state of man, that is, his relations as a political being—a being obliged by his nature and destined by his creator to live in society . . . Civil liberty is a result of man's two-fold character as an individual and a social being so soon as both are equally respected. . . There is now always meant a high degree of mutually guaranteed protection against interference with the interests and rights held dear and important by large classes of civilized men . . . together with an effectual share in making and administering the laws as the best apparatus to secure that protection.[1]

Civil liberty guarantees the rights of individuals, singly or in association, to act freely in certain fields

[1] Francis Lieber. *Civil Liberty and Self-Government.* p. 24, 25.

without a license from the State and without interference by the State or by private persons. Indeed the State undertakes to protect the rights of individuals against any partial curtailment or complete denial, whether by unlawful restrictions or by force, either public or private. Roughly, civil liberty defines the rights of any one of the people against all the rest of the people. It fixes the line up to which the individual may be himself, may follow his own will, and beyond which he may be coerced by the State's will for the good of all, and so for his own good, though he may not agree. Where, and by whom, this line shall be drawn is one of the supreme problems of government in modern society, for the answer determines how the irresistible power of the group shall be used against its dissenters.

How are these two ideas, external restraint and individual freedom of action, to be reconciled? This question furnishes the clue to all philosophical discussion of the basis of law in the nineteenth century.[2]

In accord with the common view of pure civil liberty, let us exclude material interests from our field. Its bulwarks protect persons, not property; guarantee social, not economic freedom. It is of course one of the chief weapons in the struggle for economic justice. But here we shall not concern ourselves with freedom of contract, the right to own property, or the right to labor and trade.[3] Civil liberty does not, moreover, protect the proven criminal, the child, or those adjudged insane; nor can it protect against peaceful and informal coercion—social ostracism, for example. It does not necessarily depend upon a democratic form of government—despots have been forced to grant guarantees of the individual's rights

[2] Roscoe Pound. *Harvard Law Review.* 25: 152.

[3] Ernst Freund shows the broadest view possible when he speaks of "the liberty of assuming legal relations with other persons, which we may designate as civil liberty. Civil liberty is the chief means of acquiring property." *Police Power.* p. 23.

as in Magna Carta; but it has flowered best where the citizen has had some share in the government. It is not metaphysical free-will, or the so-called "absolute liberty" of anarchy. It is social liberty, liberty within the State, to be enjoyed by responsible members of the society.

We must note how other kinds of liberty surpass our paper formulas. The chief is man's mastery of natural forces. One invention often grants more freedom than a dozen bills of rights. There is the liberty of travel, of swift communication and, greatest of all, the liberty of leisure. Yet the fruits of all these are protected by civil liberty—not a thing in itself, but the environment in which all liberties grow.

The positive elements in the idea are not easy to determine. They will certainly fall within the two following limits. Here is the minimum granted by a liberal but legal-minded authority:

> The narrowest conception of personal liberty must include the right to enter into relations which do not affect the legal rights of the parties, which do not directly endanger public safety, health, order or morality, and which are not intrinsically wrongful or vicious according to the generally accepted standards of morals or decency—such are not legitimately subject to the police power.[4]

It is clear that the last clause denies protection to all innovation—the very process we are most anxious to foster. Next we have the philosophical maximum insisted upon by John Stuart Mill in his still classic *Essay on Liberty*:

> The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of anyone of their number is self protection. . . His own good, either physical or moral, is not a sufficient warrant. . . If any one does an act hurtful to others, there is a prima facie case for punishing him, by law, or where legal penalties are not safely applicable, by general disapprobation. . . There is a sphere of action in which society has, if any, only an indirect interest; compre-

[4] Ernst Freund. *Police Power.* p. 457.

hending all that portion of a person's life and conduct which affects only himself, or if it also affects others, only with their free, voluntary, and undeceived consent and participation.[5]

The authority of this view has weakened as the revelations of science and psychology have proved how few acts there are that do not work at the expense of some one else, even if the someone is anonymous.

Enough of philosophers and lawyers! what do plain men mean by civil liberty? They mean a little list of what history records that men learned to call their "rights" and their "freedoms." They used these two different names, and thus with the native wisdom of the people marked off two distinct fields. The "rights" were what a man required for self-protection and they covered personal civil liberty. The "freedoms" were what he required for protection of his ideas and faith, in short, his spirit. They cover social civil liberty.[6]

The "rights" of our constitutions then are practical protections that assure us security in our persons, control of our own domicile and possessions, and defenses against unlawful imprisonments or punishments. They concern one man, in himself, beginning with his body. The primary right is self-defense—to bear arms, to organize one's self and one's neighbors into the militia, and to protect one's person and home against unreasonable searches and seizure by the powers that be. Less elemental but ordinarily more useful in peaceful societies, is the right to law—a right invoked when any act of the individual, whether of commission or omission, brings him into conflict with the State or with other people. Chief among the rights to law are: the privileges of the

[5] *On Liberty.* Introduction.

[6] We may note this distinction between the first two and the last three ideas in Freund's analysis of civil liberty as "the liberty and integrity of the body, the liberty of private conduct, liberty of social intercourse, liberty of opinion, and the liberty of assuming legal relations with other persons." *Police Power.* p. 23.

writ of habeas corpus; and the protections guaranteed those accused of crimes—the right to bail, to the law of the land, and to trial by jury with all its treasured safeguards. By these rights, the *uses* of liberty, the exclusive and scantily defined freedoms, are defended and encouraged.

These freedoms are positive prerogatives to be, to think, and to act like one's self. They comprise: (1) simply "freedom"—freedom to live, to move, and to exercise one's own will and thus enjoy what the Declaration of Independence describes as "life, liberty, and the pursuit of happiness"; (2) freedom of thought, which includes all religious freedom; (3) freedom of speech and assemblage, which is freedom of thought at work among people; (4) freedom of the press, which is but a mechanical enlargement of freedom of speech.

These two aspects of civil liberty are halves of one whole. The crusader of liberty needs both; for in a crisis he will be attacked by a denial of both his freedom and his rights. His freedom goes when the censor bars his words from the mail; his right, when he is denied a jury to test the order of the censorship. Popular devotion has usually been to the rights, for these were of the body and made dramatic by the struggles of the law. Now, however, they are not very frequently denied, but have become matters almost of routine, and in a sense grow less important. Liberty is no longer lost by a disregard for the laws of personal rights, *but with all their pomp and circumstance.* The dissenter goes to jail with jury, law of the land, and habeas corpus riding by his side. He goes because some one has power enough to distort the freedoms—of speech, of assembly, of the press—until no jury can be mustered that is not already prejudiced: and if one be found, neither its members nor

the judge dare resist the popular mood, no matter what preachments exist in constitutions.

So the freedoms have become of profound importance and interest. They concern the social, the evolutionary, even the spiritual aspects of liberty—liberty acting with other men and on other men for the good of society. They aim not at the mere self-preservation of society through the preservation of all its average members but at the continuance and progress of society through the protection of its rare visionaries. They ensure variation, nurse the "sports" of the species, and encourage the expression of the native bent. Freedom of thought, speech, and the press make certain first that new ideas shall come into being, and second that they shall spread.

The State, therefore, should not only refrain from interfering with but should actually protect (for its own sake) the most vigorous, radical, and habitual exercise of these freedoms. And if protection in advance against invasions of liberty by violence or against restraints without lawful warrant is impossible or fails, the State should secure the swift and adequate punishment of the lawless invaders. This duty of real protection against mob violence or any other coercion by force or fear is primary—but not always undertaken! It is an urgent duty, for if the one daring man who uses his freedom is silenced by the mob's usurpation of the State's force, a hundred less courageous souls are stopped from even admitting they favor his cause. The daring leader, now apparently without public support, is crushed. Such protection against violence is generally proclaimed as one of the ideal purposes of the modern State and finds a place in the Preamble of the United States Constitution in the words "to insure domestic tranquillity."

The civil liberties are guaranteed in the American constitutions both State and Federal, in various places: in the preambles or bills of rights prefixed to the organic law, in certain clauses of that law itself, or in amendments. We here consider only those "constitutional guarantees" that have been so expressed. They may be summarized as follows:

I. THE RIGHTS—PERSONAL LIBERTY

1. The Right to Security—life, limb, health.
2. The Right to Liberty—freedom of the body, and freedom of movement, with the privilege of emigration or immigration.
3. The Right to Equality—protection against slavery, involuntary servitude, and imprisonment for debt; against discriminations on account of color or sex, and (in general) race; and against special or hereditary privileges. These are the Civil Rights, or rights of the citizen.
4. The Right to Reputation.
5. The Right to Bear Arms and to Organize the Militia.
6. The Right to Law:
   a. Before Trial:
      Justice shall be free;
      The accused shall have the right to the common law;
      No unreasonable search or seizure;
      The right to the writ of habeas corpus shall not be denied;
      The accused shall hear the accusation;
      Bail shall not be excessive;
      Trial shall be on indictment after investigation by a grand jury;
      Witnesses shall be protected in their rights;
      The accused small be protected against "lynch law."
   b. During Trial:
      The accused shall have "due process of law, law of the land, and judgment by his peers";
      He shall have a trial by a jury of the vicinage; defined as to size, and the need for unanimity;
      He shall have counsel;
      He may summon witnesses;
      No inquisitorial methods shall be used;
      He shall not be put twice in jeopardy for one offense;
      The crime of treason shall be defined;
      There shall be no attainder.
   c. After Trial:
      No excessive fines, or cruel or unusual punishments;

No *ex post facto* law shall be passed;
Provision for pardoning is usually made;
There shall be no corruption of blood.

II. THE FREEDOMS—SOCIAL LIBERTY

1. Freedom of Conscience—especially religious liberty, including no state support, or enforced individual support of an established church; and no religious tests for participation in the government.
2. Freedom of Speech and Assemblage, including petition.
3. Freedom of the Press—with legal provisions against tyrannical coercion by libel proceedings or for contempt of court.

Most of these guarantees are found in the Federal Constitution; but a few occur only in State constitutions. Freedom of contract, here excluded, is based like the other freedoms on the idea of a positive natural prerogative—that of binding the body or mind for some future service. Strangely enough the doctrine of freedom of contract in the Nineteenth Century served to restrict personal liberty because it forbade the State from protecting the needy from contracting their very lives for low wages and unlimited hours of labor. Certain clauses of the State constitutions past or present deserve note. Exemption from service in war has sometimes been granted to religious objectors to war. Provisions against private soldiery are frequent. Social freedom implies the right to speak any language a man wishes; therefore in some States persons of foreign descent have been guaranteed the right to use their native tongues for certain purposes, generally for religious services. One or two States have gone so far as to guarantee to labor, the right to strike and to forbid injunctions against strikers. What might be called the "right to learn" was first declared in the original Constitution of Georgia, February 5, 1777, in article LIV, establishing schools. State constitutions now often include provisions for the time for holding schools, the length of the term, the age of the pupils, and for non-

sectarian instruction in public schools. Certain elements of coercion may be found in the provisions for compulsory attendance, and for the use of a specified official language (English) in the schools. None of these above provisions is in the Federal Constitution, and they are not commonly held to be parts of our traditional civil liberty.[7]

Three other ideals expressed in many of our constitutions are significant for civil liberty: first, the statements of the compact idea of the State, with equality among its people from whom all power arises; second, the guarantee of the republican form of government; and third, the provisions for amending or even entirely rewriting the constitution. The guarantees of the inviolability of the people's representatives for their words in public assemblies, and against arrest while on public business also relate to liberty.

The meanings of these liberties are never fixed. They change constantly with use and need under changing conditions. Moreover at any one time there are generally three interpretations of the guarantees: the legal, the popular, and the libertarian. In such a flux we shall seek a measuring-point by defining each liberty at the same moment, choosing for this moment December 15, 1791, the day on which the Amendments embracing the Federal Bill of Rights were proclaimed in force. We shall begin by a study of the sources and back-grounds of our ancient liberties.

[7] This outline has been taken from the valuable synopsis of the provisions of the State and Federal constitutions in Frederick J. Stimson's *The Law of the Federal and State Constitutions*. Book III, Part i, Chap. I and II, p. 121-90.

CHAPTER II

ENGLISH ORIGINS

Naturally the Constitution of the United States did not create liberty. Our American code of 1791 expressed, especially in the "rights" clauses, traditions from one to seven centuries old in Anglo-Saxon life. Most of these American rights came to us as the already developed inheritance from the English tradition flowing normally to the Colonists as Englishmen. They brought the liberty charters of the English Constitution with them. Other ideas—chiefly the freedoms—were carried here in the germ by a fragment of Puritan congregationalism which in America enlarged its church democracy into a State democracy as it had not been able to do in England. Even the so called French contributions to our ideals of liberty, for example the contract theory of the State, were not original in France but derived from the English philosophers.

In the thirteen heterogeneous Colonies, widely separated and variously settled, the power of these common English contributions differed greatly. They came into use at different times, for different causes, and with varying importance and consequences. Yet always they seem to have been remolded and strangely invigorated in their bracing new environment by the social and religious necessities of pioneering men from many nations and creeds, and they gained solid form from constant use in the century long struggle against the Crown and Crown

governors, with the attendant political philosophizing about liberty.[1]

The prime element of our liberty was in our blood. The Englishman is a psychic entity; he does not surrender his personality to any social idol—church or State or king. Yet he can compromise enough, grumbling loudly the while, to get along in society and so save his institutions from anarchy. He seems to be our most practical social animal; and his dual nature, facing both toward personality and toward society, makes him the very pattern for civil liberty. We inherit something of this gift.

Traditional liberty which he had evolved by instinct was based very simply on what he proudly named "the rights of the free-born Englishman"—security, liberty, property. His Constitution, so-called, and his Common Law are both but ways of securing to him these paramount material interests. They are nothing less than the personal liberty that remains to very Englishman after establishing the restraints demanded by the common interest. How this sphere of common interest as distinguished from individual interest arose never seemed to worry an Englishman. Not until the Seventeenth Century did he begin speculating about which came first, the person or the State. His practical philosophy began with man *in* society, by necessity not by choice. There was a common interest,—otherwise what a mess!—and he pursued the vicious circle no further.

Next he proceeded to mark off this sphere by laws which kept him from hurting the other fellow as well as the other fellow from hurting him. One's liberty was

[1] John F. Jameson. *Study of the Constitutional History of the States.* p. 16, summarizes the sources of the Federal Constitution: (1) the Constitution of England, or what the Fathers thought to be the Constitution of England; (2) the political philosophy of the time prevalent among the people, derived from both France and England; (3) ideas as to the needed form of government; (4) the already existing Constitutions of the Colonies.

limited by the exercise of an equal liberty by all the others. Outside these explicit exceptions everything else remained inviolate to himself as an individual. With characteristic acuteness he even left untouched liberties undefined, claiming stoutly anything he could as part of these vague but potent "rights of an Englishman."

The Englishman then is free to act until he runs counter to some actual law he has set up in the common interest. He no more needs a constitutional guarantee of a free press than he needs a constitutional guarantee of the right to breathe. He simply goes ahead and prints; it is his "right," and nothing can stop him but a positive law for libel or some other crime. Civil liberty in England therefore means the process of enforcing these very real rights. Moreover if anything but the law tries to interfere with them, the Englishman claims the additional right if need be to protect himself by force without penalty.

Grant man's situation in society, then give him protection against bodily assaults and false imprisonments, add the right to acquire property and he needs no State aid to achieve his own freedom. For the State after all is not greatly interested in freedom. We perceive then why only two sections of the English Bill of Rights (1688) declare the rights of the subject, while the others define the limits of the governors. The Englishman believed that restriction of the Crown creates the rights of the people. The struggle in England lay in compelling powerful forces like the King to abide by the laws and afford protection to his subjects in their rights. Dicey puts it curtly: "With us individual rights are the basis, not the result of the law of the Constitution." [2]

[2] A. V. Dicey. *The Law of the Constitution,* Chap. IV. See also Georg Jellinek's able essay, *The French Declaration of the Rights of Man and Citizens.* p. 46 and 53. He says: "The English 'rights' are collec-

This idea that a man was free to do what he wanted until the law stopped him came to America with the English settlers as part of their inherited conviction. Therefore we may say as the first step in defining our ancient liberties that they were in part the ancient liberties of England, and that most of our "rights" descended from her great charters. These were: Magna Carta (1215); Edward's Statutes (1275); the Petition of Rights (1628); the Act for Trial by Jury (1670); the Habeas Corpus Act (1679); the Bill of Rights (1688); and the Acts of Settlement (1700-1701). Often our Constitution-makers used the very words of these great originals or of the Common Law to establish the old ideals in the new governmental frame-work. They did not invent any new rights,—if they invented anything, it was the Supreme Court.[3]

To some of the Colonies these traditional "rights" were transplanted almost immediately upon their settlement. To others, especially in New England, they came slowly, for the nature of these foundations repudiated all of old England. Moreover in 1607 when the first Colonists left home, many of the rights had not yet been asserted in the mother country. It is clear that America

tively and individually confirmations arising out of special conditions, or interpretations of existing laws. . . Of the creation of new rights there is not a word in all these documents [the British Constitution]. There is no reference whatsoever to the important fundamental rights of religious liberty, of assemblying, of liberty of the press . . . and down to the present day the theory of English law does not recognize rights of this kind, but considers these lines of individual liberty as protected by the principles of the law that any restraint of the person can only come about through legal authorization."

[3] John Fiske in *The Critical Period of American History*, says: "The character of the American Revolution did not gain increase of freedom so much as it kept the freedom they had always enjoyed"; and elsewhere, he asserts: "Every bit of civil government came to America from England and not a bit of it from any other country unless by being filtered through England." Hannis Taylor declares that "excepting the due process of law clauses derived from the Great Charter, nearly all the remaining provisions of the Bills of Rights are taken from the modern English Constitution as reformed and reinvigorated during the Revolutions of 1640 and 1688." This is not true of the freedoms which are not mentioned in the English Constitution and as we show below came very indirectly from England.

got nothing but the traditions of Magna Carta and the precepts of the Common Law at first, and the Common Law was adopted slowly. But year after year as the Englishmen at home gained their rights through revolution the fruits were a little later given to or taken by the Colonists. By 1710 or 1720 they were claiming all their rights "as English subjects," including the constitutional liberties, the Common Law, local self-government, and the right to be taxed only by their own representatives. In 1772 Samuel Adams wrote that the incoming Colonists had enjoyed the rights of Englishmen by inheritance, then and to his day, "but only so much of them as they wanted to use." [4]

These claims the Crown denied with ever-increasing stubbornness, and for nearly a century constant quarrels with their governors taught the Colonists the value of civil liberty. The Americans (for so they began to feel themselves) declared that their hard-won land should not be exploited by stay-at-homes, and so like the freeborn Englishmen they were, they began resisting both tax levies and press censorships. But by 1776 they realized at last that the Crown, though now restrained at home, was not going to grant English rights abroad. Reluctantly they broke away in the Declaration of Independence and proceeded to set up their own States to guarantee themselves their *English liberties*. These were chiefly their rights as British citizens that already had legal recognition and definition both in England and the Colonies. But they also included those broader freedoms that had been set up and claimed by the opponents of the legal conception

[4] Charles E. Stevens, in *Sources of the Constitution of the United States*, writes: "They insisted they brought with them into this country the privileges of English freemen, and they defined and declared these privileges with a caution, a sagacity, and precision that have not been surpassed by their descendants." (p. 25) This is the view of an Englishman who also adds his estimate of the influence of Blackstone and Montesquieu. (See Chap. II)

in a struggle that had been going on since the middle ages with respect to liberty especially in the church. These were not derived from the traditions of the English law, but from the contemplation of the nature of man in social relations. This issue between the legal and the social rights of men was what the Constitutions tried to decide. In the main, however, the revolutionists did not fight to win new kinds of liberty as had their English forefathers in 1215 or 1640-1688. They fought to keep what they had inherited from those forefathers. The Revolution of 1776 was an English revolution for liberty. Has there ever really been an American Revolution? Have we ever learned the lesson driven deep into English minds that liberty must be won over and over, daily like daily bread?

The English origin of the American constitutional ideas is thus described:

> Though all now expressed in one document, its principles must, so far as they express the English Constitution, be regarded as a continuation, not a new enactment, and must be taken with all the historical meaning and import with which they were first viewed in the minds of our ancestors. . . . It was at first believed that the whole of the English Constitution was implied in the Federal Constitution; that there is an unwritten Constitution which we inherited in America . . . and which consisted not only of the English Constitution where not expressly altered, but of all matters of natural right and justice. Such is not, perhaps, the modern view . . . but in one hundred and twenty years of interpretation our Supreme Court has ever found some clause in the Federal Constitution into which to read any English Constitutional principle not therein expressly altered.[5]

And the United States Supreme Court has declared:

> We are bound to interpret the Constitution in the light of the law as it existed at the time it was adopted, not as reaching out for new guarantees of the rights of citizens, but as securing to every individual such as he already possessed as a British subject.[6]

[5] Stimson, *Law of the Constitutions*, p. 6.

[6] Justice Brown in Mattox v. United States, 156 *United States Reports* 243.

CHAPTER III

AMERICAN CONTRIBUTIONS

The "rights" of the American constitutions then were English, but the principle on which our political philosophers based them is precisely opposite to the Englishman's. He accepted men in society, set aside some things for the common interest, and left the rest to the individual. In America we set up first an imaginary man *outside* society, bestowed upon him some equally imaginary "natural rights in a state of nature", and finally assumed a compact by which he ceded certain of his powers to the common interest.[1] In the end our Bills of Rights merged rights at law and natural rights with apparent indifference to their contradictory origins and left a permanent weakness in the liberty guarantees in this possible dual interpretation.

Whence came this conception of man's "natural rights"? From the Puritan, I think, and his sense of personal responsibility to God. He took the seed of the Protestant Reformation, gave it an economic twist, and through his congregations passed it down in a rationalization of his own needs. One view of the Puritan, largely Continental, is that the basis of his liberty was the Christian assertion that all souls are priceless and equal. Because of this faith the primitive Church was communistic. In the Papacy this primal simplicity vanished in imperial splendor and the ideal of equality was almost

[1] "The English statutes are far removed from any purpose to recognize general rights of man, and they have neither the power nor the intention to restrict the legislative agents or to establish principles for future legislation." Jellinek, *op. cit.* p. 87.

lost. In Luther's revolt it was reborn; and this will-to-democracy which had first descended on the common man through the Christ came back into our life, first through the Church and then through the State. Since that rebirth our churches and our states have at least proclaimed that all men are equal, born equal says the State; die equal, says the Church,—and must enjoy equality,—here, says the State; hereafter, says the Church. Every man is the son of God whatever other constitutional status he may lack; and so holds certain original and inalienable personal rights as a living soul. Next, shift this equality in the sight of God to equality in the sight of men, and you bring democracy from Heaven into the town meeting. This shift is what the democracy through Christ of the Puritan, a far sterner thing than our tepid "Christian democracy" achieved. It is easy next to deduce that each man's conscience possesses final authority and must be respected not only by his prince and priest but, and this is the very heart of the matter, by himself. And so we can write the First Amendment to the Constitution on this foundation—freedom of thought demanding freedom of speech, the press and assemblage.[2]

The trouble with accepting the doctrine of "Puritan Liberty" in *toto* is that the Puritans never practised it. They never permitted other non-conformists any freedom. Moreover, the movements of the Reformation were not merely religious; they involved intricate economic, and radical, motives, and the resultant assertion of the individual as separate from any institution was perhaps as much due to the rise of the bourgeoise trader and ur-

[2] This general view is expressed by Jellinek: "Religious liberty is the source of establishing by law a universal right of man. . . Not the State but the Gospel proclaimed the principles of religious liberty." *Op. cit.* p. 75-6. Charles Borgeaud adds: "The Reformation set free the conscience and created the individual." In *The Rise of Modern Democracy in Old and New England.*

ban commerce as to any single cause. It was rationalized in one form as a religious deduction, and in another by the free-thinking philosophers of the seventeenth and eighteenth centuries into the doctrine of "natural rights" for which they claimed Greek sources and a metaphysical background.

In politics the Reformation expressed itself by overthrowing the old Church hierarchy. The Puritans went further and translated their religious democracy into a sort of political democracy—within their own sect. Their religion had its popular basis, for the congregations were independent and self-governing, recognizing at heart no authority but God Himself. The Puritan therefore gave his allegiance to the congregation which was of God rather than to the King, who even if one admitted his divine right claims, was only God's viceroy. The congregation's divine right was better than the King's.

But to protect their church and their economic interests, the Puritans soon had to concern themselves with politics. The State could so interfere with their religion and their business that they had to do something about the State. The plain will-to-power and individual self-seeking helped excite political ambitions. The political meetings began to demand this same recognition of the individual and the granting of a system of democratic control like that of the Church. The minister was chosen by vote of the Church members, why not the governor? "The civil magistrate like the religious functionaries ought to be chosen with the consent of the people," said Minister Brown, the founder of Congregationalism and one of the first defenders of civil liberty.[3]

[3] "The logical consequence of such an independent system of autonymous churches, each ruling itself . . . was in ecclesiastical matters, the separation of the State from the Church, religious tolerance, and in political matters a new and decisive step in the path of democracy." Borgeaud. *op. cit.*

Thus the Congregationalists developed a strong belief in their right to govern themselves in seculiar matters, taxes for example, through popular representatives. But neither baron nor bishop had any idea of letting single congregations set themselves up as of divine origin, or of admitting that government could arise out of little roomsful of common people.

Sometimes the divine-right King sought to coerce these divine-right folk through the Church, imposing the State religion, forbidding their conventicles, often enough, revoluntionary hot-beds, and passing a Five Mile Act to disperse their congregations. Sometimes as their mere lord he used political methods against this dual dissent, taking away their arms, quartering troops on them to insure obedience, taxing them to death. The Puritans found their congregations and their local governments alike being crushed, and like the stubborn freeborn Englishmen they were, they resisted this tyranny whether by bishops or tax-collectors. This conflict was the Puritan Revolution; the final compromise was England until 1914.

The conflict so sharpened their sense of needing some permanent guarantee of their religious and civil rights against governmental usurpation that at one time there arose a rough draft of a written compact—constitution, and attached thereunto, *the first model of a bill of rights.* It was to restrain their own representatives in Parliament, especially respecting civil liberty in the later precise American sense. This "Agreement of the People of England" was drawn up in October, 1647, under the influence of the Levellers, early civil libertarians, by the Council of the Puritan Army under Colonel ("Freeborn") John Lilburne. After a reconsideration it was presented as a manifesto to the House of Commons in

the name of the Army, on January 15-20, 1648. The significant parts are:

IV SECTION

That the power of this and all future Representatives of this nation is inferior only to theirs who choose them, and doth extend . . . and generally to whatsoever is not expressly reserved by the represented themselves,

Which are as follows

1. That matters of religion and the ways of God's worship are not at all entrusted by us to any human power because therein we cannot remit or exceed a tittle of what our consciences dictate to be the mind of God without wilful sin; nevertheless, the public way of instructing the nation (so it be not compulsion) is referred to their discretion;

2. That the matter of impresting and constraining any of us to serve in the wars is against our freedom; . . .

3. That in all laws made or to be made every person may be bound alike, and that no tenure, established charter, degree, birth, or place, do confer any exemption from the ordinary course of legal proceedings whereunto others are subjected.[4]

Here at a date between Roger William's "Bloody Tenet" and the Maryland Toleration Act in America, we have the first guarantee of religious liberty in England, even though this did not extend to "popery or prelacy." Here too is the first statement respecting exemption from military service on religious grounds, and also the guarantee of equality before the law and no special privileges. Yet neither this tentative constitution nor a more formal one in 1653 was adopted. In Old England the Puritan could not overthrow the ancient tradition or its deep-rooted institutions, for he himself was of the tradition. With a typical English compromise, from 1626 to 1701, he kept setting restrictions upon the Crown's prerogative, winning in 1688 his magnificent Bill of Rights. Outside of this he also asserted the claim to freedom of press and assemblage so vigorously through

[4] Gardiner, Samuel R. *Constitutional Documents of the Puritan Revolution,* No. 71, p. 334, and No. 81, p. 359. The last is the revised form, dated January 15.

champions like John Milton that they became unofficial principles, incorporated in the creed of the people though never in the Constitution.

Liberty and the American Puritans

Meanwhile the main Puritan impetus had come to America just at the beginning of the struggle in England. The self-exiled congregation that set out under Minister Robinson in 1620 had only the germ of liberty to bring into the desert, for they came nearly a decade before the English Petition of Rights. And after signing their Compact in Provincetown Harbor they lived through more than fifty years of dissent before the important English liberty charters were obtained. Here at last is found a truly American contribution to liberty. They put into practice the experiment of a commonwealth based on individual liberty, religious democracy, and social compacts. Their practice in liberty was pretty poor, as evidenced by the trial of the Reverend John Dunster, first president of Harvard College, for some heresy with regard to infant baptism, and by their barbarous treatment of the Quakers.

The Americans enjoyed a freedom that the Puritans in England could not have, and so developed quickly. They were speedily sending home exponents of the new ideas in social organization, compacts and liberty. Even the fore-mentioned attempt at an English constitution in 1647 was inspired by the sermons in America of Hooker, Cotton and Mather which by 1640 were being printed in London. Their thinking resolved itself into two concepts that have profoundly influenced all our later thinking on liberty: first, the idea of "natural rights"; and second the theory of the "compact" State. They deduced both from their philosophy of religious individualism and from their

system of church government. The net result was the idea that a State is created by an agreement between persons coming out of a state of nature and so endowed with certain inalienable *natural,* not political, rights.

As the genesis of the Bills of Rights was implicit in the idea of natural rights a definition is necessary. But it is as difficult to say what natural rights meant then as to-day. One notion was of religious origin as previously described, that every soul is free and equal. They are drawn from the very God-head and so can never be surrendered to any State. They attach themselves to the soul and so precede society. Their elements are freedom of conscience, the right to worship as a man wills, and of preparing for an eternity with God. They are above the State, yet from this spiritual source a practical code of social rights may be deduced. The second version of natural rights came a century or so later from the English philosophers or French rationalists. They offered an earthly and pagan substitute for the Christian equality in God, with the Golden Age of Greek Myth replacing the vaguely imagined state of nature in Eden. Here was an effort to rationalize individuality by tougher minded thinkers than the religionists. Both trace back to the Reformation.

This common origin of both spiritual freedoms and natural rights is revealed in their constant interaction, the extension of one by virtue of the other. The Puritans extended religious liberty to preserve other natural rights; the philosophers, like Jefferson, reversed the argument and urged natural rights as the basis of the special right of religious liberty. Both agreed that certain rights exist irrespective of society or of a particular State. They could not be destroyed by the State but in theory might be resumed by men at will. The State merely

guaranteed them. However, both theology and political philosophy overlooked the fact that nobody ever had existed in this isolated state of nature, and that consequently nobody has any natural rights but only those guaranteed by his own strength or the strength of some power which he with others may organize.

Yet to these seventeenth and eighteenth century Americans natural rights were real and made possible the social compact. The compact-state doctrine has two forms with a single important corollary. In form one the compact is between a ruler and his subjects. He promises to do certain things and to obey certain rules in governing them. In form two the compact is among the people themselves. They contract to establish a government, to obey common laws, and so to limit their natural rights. The corollary to both is that the people have certain reserved rights held out of the contract. In form one, these reserved rights are restrictions on the powers of the ruler in favor of the ruled. In form two they are the inalienable rights of the individual which neither the government he creates nor his fellow-contractors can alter or impair. Reservations of both sorts are inherent in American liberty.

Belief in the ruler-people compact had a powerful influence on pre-Revoluntionary thought. To the mind of the people such compacts actually did exist in the charters, grants, and proprietary contracts with the King of England or representatives. These were real documents, ranging from settlements of boundaries to prescriptions of the rights and duties of both settlers and overlord.[5] When the latter did not fulfill these charter promises, regarded as agreements in perpetuity, the contract was

[5] Borgeaud suggests that for the theological-minded New Englander this ruler-compact idea may have been reenforced from the Scriptures. The Old Testament offers repeatedly the notion of a treaty or alliance between Jehovah, the King, and the Jews, his subjects.

assumed to be dissolved, and the people deemed themselves justified in recapturing their rights and exercising them in spite of coercion. For nearly a century the struggle for liberty lay partly in forcing an English King or some proprietor to live up to his bargain.

Now comes the significant fact for civil liberty. The Colonists soon claimed that the principal gift guaranteed to them by these compacts was *their constitutional rights as free-born Englishmen.* This constitutional status, they averred, if not mentioned, is anyhow implied by the very existence of such agreements. They wanted the right to jury trial, bail, habeas corpus and kindred liberties as Englishmen living in a larger England. As the Puritan Revolution in England extended these home-land rights, the Colonists also claimed the new as their own. Thus were deduced many of the rights clauses of American liberty. Here was no thought of original "natural" rights but of legal or contract rights—first agreed upon, *thus* acquired for America, and then inherited. So violent was this dispute ending in revolution that later when the Americans began forming native states among themselves, they were militantly precise in defining rights which had been denied to them by England. They form much of the early Bills of Rights.

The people-compact buttressed a further right. It was indeed earlier created by Puritan thought in America. Its plain origin was that the first American congregations based their secular government upon their church democracy. In this last, they felt that a kind of religious compact joined them all as sovereign souls in one body as the servants and representatives of Christ. They began with a *compact* religion.[6] Next, the pioneer

[6] Borgeaud believes that the guild agreements of English craftsmen also helped to develop this compact philosophy. He shows that certain members of the early Pilgrim groups were surely acquainted with guild rules, and so with ideas of self-government by equal members.

congregations had actually made compacts to come to this country. The dangerous adventure was not entered upon lightly. They must have physical and spiritual solidarity whether expressed in compacts or not. Finally when they arrived they found themselves in something like a true "state of Nature," tiny groups, isolated in a wilderness, who must be self-governing over long periods, and out of whom original compacts could arise.

It is natural, therefore, to find the very first Pilgrims drawing up a compact—the "Agreement of the Colonists," signed by all the Mayflower party, including crew and servants, before they landed just inside Cape Cod, November 2, 1620.

> They were in a sort reduced to a state of nature; and before they landed wisely formed themselves into a body politic.[7]

They promptly began to develop the theory of compacts and as early as 1631 we find the philosophy expressed by the Reverend Richard Hooker.[8] By 1639 came the noble Fundamental Orders of Connecticut—the first charter for American democracy—in which as in all early New England foundations there is a practical affirmation of the compact as a base for parallel church and civil government:

> And well knowing where a people are gathered together the word of God requires that to mayntayne the peace and union of such a people there should be an orderly and decent government established according to God to order and dispose of the affayres of the people at all seasons; doe therefore assotiate or conioyne ourselues to be as one Publike State or Commonwelth; and doe for ourselues and our Successors enter into Combination and Confederation together, to mayntayne and Prsearue the liberty and purity of the gospell of our Lord Jesus who we now profess, as also the disciplyne of the Churches wch according to the truth of the said gospell is now practised among us; as also in Ciull Affaires to be guided and gouerned according to

[7] *Prince's Annals.* (1736). p. 171.

[8] Twitchell, Joseph H. *Connecticut Historical Society. Celebration of the 250th Anniversary of the Fundamental Orders,* address on Hooker.

such Laws, Rules, Orders, and decrees as shall be made, et cetera. . . [9]

In 1640 the immigrants to Rhode Island affirmed religious liberty as a right of the people in a compact government. They made this reservation in their constitution:

> Wee agree, as formerly hath bin the liberties of the town, so still to hold forth liberty of conscience. [10]

This was perhaps the first time in history that people in the very act of organizing a government reserved certain rights to themselves as individuals. It was eight years before similar reservations were included in the "Agreement of the People of England." [11] So simple a sentence, uttered from this tiny atom of society on the bleak New England coast, held the germ of the bills of rights, and was the first formal assertion of religious liberty in America!

In 1643 the neighboring town of Chester adopted an extract from Rhode Island's "liberties" and thus began the spread of the practice of reserving rights. From then until the Revolution of 1776 the compact idea was perfected in America and England both as a philosophical theory and a true guide to statecraft. Hobbes, Milton and Locke preached it at home. Locke drew up his model but unsatisfactory Constitution of the Carolinas upon it. (1669). In the Colonies Pastor John Wyse printed his *Vindication of the Government of New England Churches* wherein the foundation for the future democracy is established on the compact democracy of New England church groups. The doctrine became a principal argument in pre-Revolutionary agitation. Says John Adams in *Novanglus*:

[9] Poore, *Charters.* 1, p. 249; Elliott. *Debates.* p. 15.
[10] *III Records of Rhode Island.* I, p. 28.
[11] See p. 27.

How then do we New Englanders derive our laws? I say not from Parliament, not from the Common Law, but from the law of nature and the compact made with the King in our charter. [12]

Observe how the Colonial radical invokes both natural rights compact and ruler-people compact to defend his agitation. Samuel Adams in *The Declaration of the Rights as Men* uses the natural rights idea alone as a basis for all liberty.

They have a right to remain in a state of nature. . . They enter society by voluntary consent. Every natural right not expressly given up, or from the nature of the social compact, necessarily ceded, remains, as neither reason requires nor religion permits the contrary, every man living in or out of a state of civil society has a right peaceably and quietly to worship God according to the dictates of his own conscience. [13]

After the Declaration the situation of the Americans again favored this natural rights doctrine. They were relieved of their old allegiance, dissolved as it were into the social elements. All larger governmental units were upset, though local government and most of the bonds of organized society still persisted. They found themselves indeed in something resembling a state of nature politically, and they thought of themselves as drawing up new social compacts in which the people would this time put down carefully the rights "held forth" from the government. To these revolutionaries, seeking to rationalize their economic and social self-interest, their revolt seemed a glorious wedding of community action—democracy—with freedom so that each man might exercise his rights.

In a century and a half (1620-1770) the Colonists had done these things: The Puritans had set up the principle of religious liberty and evolved a philosophy of natural rights which every man possesses by his simple existence and divine destiny. Their congregational com-

[12] Adams, John. *Works.* IV, p. 122.
[13] Wells, S. A. *Life of Samuel Adams.*

pacts had given them the idea of social compacts into which this free individual enters by voluntary contract, abridging some of his rights but reserving others, which he specified as part of the compact or constitution. These reservations become bills of rights.

The impossibility of moulding society according to any such speculative formula should have been clear from the very first compact. That little gathering in the Mayflower's cabin was bound up with all society, human history and culture. The "state of nature" was, of course, among the Indians in the wilderness. To venture alone against either wilderness or Indian armed only with one's "natural rights" was to invite death or disaster. Both perils had to be conquered by the settlers' organized social strength, with that complex by-product of society, gun-powder. Organization and gun-powder alike curtail liberty! Moreover the ancient salt of irony was in the Mayflower agreement. The majority had to hasten to agree among themselves lest there be *no* agreement! For there were certain malcontents abroad who were resisting the common will already. The minority was being coerced by the State even at its voluntary birth. It may also be observed that the New England theocracy early became so rigid with power and the sense of its own sanctity that it neither tolerated dissenters from its compact nor even graciously permitted them to withdraw again into their state of nature, as the theory provides. Roger Williams had to steal away in search of liberty. The self-satisfied theocracy was against freedom. It kept Roger Williams in, lest he go out to damnation; it kept the Quakers out lest they bring damnation in. The principle has always conformed to the interests of the powerful.

But this is the inconsistency of a great force. They

established the principle of religious independence and personal rights—the greatest single contribution of America to liberty. They even sent back spiritual vigor to the Puritans who were fighting for liberty in England. Then the tide of English settlement decade by decade brought to us the new liberty of England. Other Colonies than New England fought for their "rights" and with her proclaimed the value of a free press, the second right formulated among American liberties. So finally we have the Puritan freedoms, the Puritan-English "rights" from the Motherland, and then a Colonial ideal of liberty which under pressure of a silly Hanoverian King finally coalesced the Puritan freedoms and the English rights into the native American bills of rights.

CHAPTER IV

THE BILLS OF RIGHTS

About 1750 the Colonists began to get their rights into words and draw up codes. Statesmen and philosophers framed terse axioms on liberty, and these passed from mouth to mouth, from newspaper to newspaper. The forms of the guarantees began to get set in the Colonial mind through which the ideas were running briskly, often already in their public dress of rhetoric. Popular feeling was fixed in memorable phrases so that by 1776 George Mason had a full armory of sonorous words from which to draw up the Virginia Declaration of Rights.

The first frame for an American bill of rights was constructed in 1764 when James Otis drew up the declaration of "The Rights of the British Colonists," asserting definite limitations on the home government—the first important statement of the general principle that the government should be restricted by the people since the brief clauses of the abortive Puritans "constitution" in England over a century before. The next year, the Stamp Act Congress, October 19, 1765, made the first *inter-Colonial* claim for the right to trial by a jury. That same month the list of grievances in the Massachusetts Resolves foreshadowed the Declaration of Independence.

By November 20, 1772, the notions on Colonial rights had grown into the "Declarations of Rights as Men, as Christians, and as Subjects, by the Citizens of Boston," an important basis for later claims. Though this was

adopted by nothing more than a town-meeting, the ideas won wide approval. In three sections, the practical rights were deduced from a philosophical basis of natural rights and social compact ideas, plus New England Congregationalism. But with the customary confusion as to the dual origin of American liberties, Samuel Adams, in his section on "The Rights as Men," forsakes philosophy and sets up the ancient claim to the English rights to "life, liberty and Property." [1] Our practical forefathers would bring down liberty with one barrel if not with the other.

In 1774 the First Continental Congress met to represent eleven of the Colonies, and on October 14 issued a "Declaration of Rights and Liberties." This is the Magna Carta of civil liberty in America. [2] The Congress declared that the Colonists' assemblies had been dissolved and their petitions treated with contempt; and that, therefore, they issued this Declaration that their "religion, laws, and liberties might not be subverted"; and

> That the inhabitants of the English Colonies in North America, by the immutable laws of nature, the principles of the English Constitution and the several charters or compacts have the following rights:
>
> They are entitled to life, liberty, and property; their ancestors were entitled to all the rights, liberties, and immunities of free and natural-born subjects within the realms of England; they and their descendants were entitled to them under local circumstances; the foundation of English liberty and all free government is the right of the people to participate in their legislative council; they were entitled to the Common Law of England, and to be tried by their peers of the vicinage; they had a right to the English statutes . . . peaceably to assemble and petition the king; that there be no standing army; and that the branches of the legislature be independent.

This document lays claim to practically all the liberties in the English Constitution. Another declaration by

[1] Wells, S. A. *Samuel Adams.* I, p. 502.

[2] "It contained the assertion of several great and fundamental principles of American liberty, and it constituted the basis of . . . subsequent Bills of Rights" says Hannis Taylor in *Origins of the Constitution.* See also Stevens, C. E. *Sources.* p. 210. The text of the Declaration is in *Journal of the Continental Congress.* I, p. 63-73.

this Congress, "The Address to the Inhabitants of Quebec," even included a clause asserting the value of a free press (see page 90) and mentioned these special rights:

> To be ruled by their own laws made by their own representatives; trial by jury; liberty of the persons and the rights to the writ of habeas corpus; tenure of land by easy rents.[3]

But these were the last claims ever made by the Colonists, now on the verge of Revolution, for their English rights. Their next assertions were of their own *American* rights based on their new political philosophy, and including the abstract freedoms notably absent before.

State Bills of Rights

To the Bills of Rights of the new self-established States we must look for the first forms and original meanings of the American liberty guarantees. Eleven of the Colonies adopted state constitutions before the Federal charter was framed, and their liberty clauses served finally as the model for the national Bill of Rights. First and most important of the State Bills was the Virginia "Declaration of Rights," written by George Mason, and adopted June 12, 1776, by the Convention then drawing the Virginia Constitution, and so preceding the Declaration of Independence by three weeks. This was the first declaration of our liberty ideals by a free American State. It may justly be compared to the Bill of Rights of 1688 in England, and its sixteen articles served as guides to all the other States.[4]

[3] *Journal of the Continental Congress.* I, p. 108.

[4] New Hampshire adopted the first State Constitution, a two-page frame of government, January 5, 1776, but *without a Bill of Rights;* South Carolina followed, March 26, but did not include a Bill until a second Constitution in 1778. The other States adopted organic laws as follows: New Jersey, July 1776; Delaware, September 21, with a full Bill, reasserted in 1792; Pennsylvania, September 28; Maryland, a comprehensive Bill, August 14, and a Constitution, November 11; North Carolina, Decem-

THE VIRGINIA DECLARATION OF RIGHTS, JUNE 12, 1776

A Declaration of Rights Made by the Representatives of the Good People of Virginia, Assembled in Full and Free Convention; Which Rights Do Pertain to Them and Their Posterity, as the Basis and Foundation of Government.

Section 1. That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

Section 2. That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.

Section 3. That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation or community; of all the various modes and forms of government, that is best which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of maladministration; and that when any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable and indefeasible right to reform, alter, or abolish it in such manner as shall be judged most conducive to the public weal.

Section 4. That no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services; which not being descendible, neither ought the offices of magistrate, legislator, or judge to be hereditary.

Section 5. That the legislative and executive powers of the State should be separate and distinct from the judiciary; and that the members of the two first may be restrained from oppression, by feeling and participating in the burdens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent, certain, and regular elections, in which all, or any part of the former members are to be again eligible, or ineligible, as the laws shall direct.

Section 6. That elections of members to serve as representatives of the people, in assembly, ought to be free; and that all

ber 18. February 5, 1777, Georgia adopted a Constitution, the liberty guarantees being scattered all through it; and on April 20, New York adopted a charter with a very full Bill. The long Massachusetts Bill came in 1780. Connecticut ratified the royal charter of 1662, but added a Bill of Rights to "protect its civil and religious rights and liberties." It secured a Constitution in 1818. Rhode Island continued under its royal charter, unchanged until Dorr's Rebellion in 1843. Vermont adopted a Constitution, July 8, 1777, but did not enter the Union until 1794. For the texts of these Bills see Poore's *Charters*.

men, having sufficient evidence of permanent common interest with and attachment to the community, have the right of suffrage and cannot be taxed or deprived of their property for public uses without their own consent, or that of their representatives so elected, nor bound by any law to which they have not in like manner assented for the public good.

Section 7. That all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised.

Section 8. That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with his accusers and witnesses, to call for evidence in his favor and to a speedy trial by an impartial jury of twelve men of his vicinage, without whose unanimous consent he cannot be found guilty; nor can he be compelled to give evidence against himself; that no man be deprived of his liberty, except by the law of the land or the judgment of his peers.

Section 9. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section 10. That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons, not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive and ought not to be granted.

Section 11. That in controversies respecting property and in suits between man and man, the ancient trial by jury is preferable to any other and ought to be held sacred.

Section 12. That the freedom of the press is one of the great bulwarks of liberty and can never be restrained but by despotic governments.

Section 13. That a well-regulated militia, composed of the body of the people trained to arms, is the proper, natural, and safe defense of a free State; that standing armies in time of peace, should be avoided, as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by the civil power.

Section 14. That the people have a right to a uniform government; and, therefore, that no government separate from, or independent of, the government of Virginia, ought to be erected or established within the limits thereof.

Section 15. That no free government, or the blessings of liberty, can be preserved to any people but by the firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles.

Section 16. That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force, or violence; and there-

fore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practise Christian forbearance, love and charity towards each other.[5]

This naive mixture of morals and state-craft is profoundly moving. It is English, but with a larger hope: it was the first affirmation of liberty by an American people; and it became the model for later bills of rights. That of Maryland was perhaps the most practical. It was complete, particular, explicit, and just; fuller, yet less concerned with doctrinaire theory than Virginia's. It seems to have arisen directly from the complaints of the Declaration of Independence, and it remains the clearest contemporary statement of the ideals of liberty. That of New York (1777) was more conservative and precise, and drawn with a more skilful legal technique. Massachusetts rejected the first constitution submitted to her by the General Court in 1778, partly because it contained no bill of rights.[6] The Constitution of 1780 (still in force) contains a Bill of forty-four sections, analyzing republican ideals and individual liberty at great length.[7]

The comparison of these various Bills is the best way to understand what the American States thought to be the value of civil liberty, and how it might be preserved against governments by written formulae. They do not of course tell us what actual liberties existed behind these paper bulwarks. Distrust of the real value of any Bill existed then in Hamilton's mind. And from the beginning their basis in the unreal metaphysics of "natural rights" made many of their provisions mere empty words. Justice Story justly described their usefulness:

The bill of rights is important whenever it operates as a qualification upon powers actually granted by the people to the

[5] Poore, P. P. *Charters and Constitutions.* II, p. 1908-9.

[6] Duniway, C. A. *Freedom of the Press in Massachusetts.* p. 132.

[7] Poore. *Charters.* I, p. 956; Stevens, *Sources of the Constitution.* Chap. VIII.

government . . . whenever a general power exists or is granted to a government which may in its actual exercise or abuse be dangerous to the people, there seems a peculiar propriety in restricting its operations, and in excepting from it some at least of the most mischievous forms in which it is likely to be abused.

A bill of rights may be important even when it goes beyond powers supposed to be granted. It is not always possible to foresee the extent of the actual reach of certain powers, which are given in general terms. They may be construed to extend (and perhaps fairly) to certain classes of cases which did not at first appear to be within them. A bill of rights, then, operates as a guard upon any extravagant and undue extension of such powers. . .

Besides it is of real efficiency in controlling the excesses of party spirit. It serves to guide an enlighted public opinion, and renders it more quick to detect and more resolute to resist, attempts to disturb private rights. It requires more than ordinary hardihood and audacity of character to trample down principles which our ancestors have consecrated with their reverence; which we imbibed in our early education; which recommend themselves to the judgment of the world by their truth and simplicity; and which are constantly placed before the eyes of the people, accompanied by the imposing force and solemnity of a constitutional sanction. . . It is an important protection against unjust and oppressive conduct on the part of the people themselves. They have a tendency to impress some degree of respect for them, to establish public opinion in their favour, and to arouse the attention of the whole community.[8]

James Bryce, in a dryly humorous resume of the State bills of rights, adds:

It is argued that such declarations of principles have a practical value, as asserting the rights of individuals and minorities against arbitrary conduct by a majority in the legislature, which might, in the absence of such provisions, be tempted in moments of excitement to suspend the ordinary law and arm the magistrate with excessive powers. They are, therefore, it is held, safeguards against tyranny.[9]

The State bills serve also to reflect changing ideals of liberty. While the Federal Constitution has not often been amended and never redrawn, the States rewrite their organic law from time to time, so that in the newly in-

[8] Story, Joseph. *Commentaries on the Constitution.* III, p. 718, 719, sec. 1859, 1860. Kent, James. *Commentaries.* p. 611, 612.
[9] *The American Commonwealth.* I, p. 422-6.

vented guarantees or in the disappearance of old ones we may trace the rise and fall of liberty. The Constitution of Oklahoma, 1908, compared with the first New York act of 1777, throws much light on American history.

The State Bills are not to-day very familiar to the average man. He does not feel that his liberty resides in them, but holds a larger faith in the Federal guarantees despite the repeated decisions of the Supreme Court that these protect persons only in their national, not in their State rights. (See note 17, page 50) But every State retains a Bill of Rights; and they are the symbols of a deep-rooted faith, for no party would dare propose their removal.

The National Guarantees

Turning from the States, we find the first *national* act respecting liberty in the Declaration of Independence. This is in fact a bill of complaints over lost liberties rather than a charter for new ones. This is liberty flaming into armed revolt, not withdrawing timidly behind its constitutional guarantees. The Declaration is a challenge in time of action. The Preamble does however contain a proclamation on doctrinaire liberty, and its grievances are instructive for they specify what the Bills of Rights later intended to redress. Civil liberty meant the opposite of the following evils:

> The King has obstructed the administration of justice by refusing his assent to laws establishing judiciary powers. He has made judges dependent on his will alone, for the tenure of their offices and payment of their salaries. He has kept among us, in times of peace, standing armies, without the consent of our legislature. He has affected to render the military independent of, and superior to, the civil power. He has combined, with others, to subject us to a jurisdiction foreign to our constitution . . . giving his assent to pretended acts of legislation . . . for quartering large bodies of armed troops among us; for protecting them by a mock trial from punishment. . . For depriving us in many cases, of the benefit of trial by jury; For transporting

us beyond seas to be tried for pretended offenses; For abolishing the free system of English laws in a neighboring province; . . . He has constrained our fellow-citizens taken captive on the high seas, to bear arms against their country. . . In every stage of these oppressions we have petitioned for redress in the most humble terms; our repeated petitions have been answered only by repeated injury. . . [10]

The Articles of Confederation (1781) contained no bill of rights or guarantees. Here was merely an alliance of sovereign States, formed, "in order to obtain such establishment as that their religion, laws, and liberties may not be subverted," but entrusting still to the individual States the protection of the liberties of their people. There were no citizens of the Confederation.

But six years later the Continental Congress did proclaim the first national formulation of the guarantees of liberty in the Ordinance for the Government of the Northwest Territory, passed July 13, 1787. Here Congress was providing an actual government for people, so it included a sort of condensation of the State Bills of Rights. Further it included vigorous testimony to its faith in liberty with this declaration:

For extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions are erected; to fix and establish these principles as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory; . . . [11]

The guarantees included one on religion: "No person demeaning himself in a peaceable and orderly manner shall ever be molested on account of his mode of worship or religious sentiments"—and others insuring the benefits of habeas corpus and trial by jury; the use of the common law; the acceptance of bail; moderate fines without cruel or unusual punishments; the law of the land and judgment by one's peers; compensation for property or

[10] Poore. *Charters.* I, p. 1-6.
[11] Poore. *Charters.*

services taken by the public; and no interference with private contracts.

More convincing evidence of the real liberalism of the Confederate Congress at this moment is found in the following provisions:

Schools and the means of education shall forever be encouraged.

The lands and property (of the Indians) shall never be taken from them without their consent; and in their property, rights and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress.

There shall be neither slavery nor involuntary servitude in the said territory.

This last significant Article Six foreshadows the Amendment added to the national Bill of Rights by the Civil War. All in all this first experiment by the United States in defining civil liberty is encouraging.[12]

The Constitution of the United States (1787) was much less encouraging. As adopted it contained no bill of rights, though some few of the guarantees were incorporated in the body of the instrument. Indeed, the Convention vetoed a proposal for a bill at the very end of its labors, September 12, 1787.

Gerry and Mason moved a Committee to prepare a bill of rights. Sherman thought the State Bills of Rights sufficient, and the motion was lost by a tie vote, Massachusetts divided, New York not voting, five northern states for it, five southern states against it. Some difficulty perhaps was apprehended by the South in drawing up a bill of rights to square with the existence of slavery.[13]

[12] Some connection has been suggested between the French "Declaration of the Rights of Men and Citizens" (August 26, 1789) and the Federal Bill of Rights. But as the proposals for the latter were made in June of the same year, the French doctrines could have had no influence. The situation was, as Jellinek points out, precisely reversed, for many of the French provisions were taken from clauses in the State Bills from 1776 on. Dr. Charles A. Beard has shown that little in the American guarantees can be traced to French sources. See his *American Government*. p. 34-6.

[13] Hildreth, R. *History of the United States*. III, p. 523; Elliot. *Debates*. V, p. 538; II, p. 435.

The matter was viewed very casually, though later the whole instrument was almost rejected because of this failure to protect the popular liberties. Gerry urged his motion on the ground that such a bill could be prepared in a few hours with the aid of the State bills. Wilson, explaining later to the Pennsylvania Ratifying Convention, said:

> I believe the truth is, such an idea never entered the minds of many of them. I do not recollect to have heard the subject mentioned until within about three days from the time of rising.

Stimson declares that a Bill was opposed in the Convention by the Federalists, representing the privileged classes:

> The powers of the state government being original, not delegated, its legislature represented a power that at its origin was sovereign. Here, therefore, the Federalists became the upholders of individual rights and property, and imposed the checks in the State Bills of Rights that we find so notable in Virginia and Massachusetts. It is as true, as are most antitheses, that the people imposed the bill of rights upon the Federal Government . . . and that the so-called privileged classes imposed similar checks upon state legislatures.[14]

Some members of the Convention doubtless believed sincerely that no bill was needed, since the separate States could and did guarantee personal liberty. These most probably rejected the proposal for political reasons. For one thing they did not want to suggest that they were framing a government so powerful that protections against it were needed. At all events, despite the models both in England and the new States economic and political interests kept a bill out of the Constitution as drafted, and defended the omission with brilliant speculations. Hamilton, for example, thus discussed the proposal in the Federalist, LXXXIV:

[14] Stimson. *Federal and State Constitutions.* Chap. IX, p. 68, 69 ff.

Bills of rights are in their origin, stipulations between kings and their subjects, abridgements of prerogative in favor of privilege, reservations of rights not surrendered by the prince. . . It is evident, therefore, that, according to their primitive signification, they have no application to the constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing; and as they retain everything, they have no need of particular reservations. "WE, THE PEOPLE of the United States . . . do ordain and establish this Constitution." Here is a better recognition of popular rights, than in volumes of those aphorisms which make the principal figure in several of our state bills of rights, and which would sound much better in a treatise on ethics than in a constitution of government. I go further and affirm that bills of rights . . . are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which such restriction may be imposed? . . . They might urge with a semblance of reason, that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and that the provision against restraining the liberty of the press afforded a clear implication that a power to prescribe proper regulations concerning it was intended to be vested in the national government.

Hamilton was certainly ingenious, though perhaps not consciously insincere. For the most disinterested men in the Convention designed merely to organize a strong central government *of* and *by* the States. The once proposed opening words of the Preamble: "WE, THE STATES of the United States," show the idea in mind. No one can guarantee civil liberty to a State! Moreover they regarded the checks and balances of the proposed government as a mighty protection against the unsurpations of power which alone curtail liberty. With some such ideas, honest or specious, these gentlemen, anxious to construct a frame-work for law and order (and credit), and get it accepted without any clauses that might weaken these precious things, send forth the Constitution with no affirmation of the liberties of the people.

But the people were not convinced. They so vigorously demanded a bill of rights that in the State ratifying conventions this omission was a main argument against the entire document.[15] Americans had won freedom at a high price, and they refused to endanger it under a new management that did not guarantee them personal liberty. The crisis came in Massachusetts. If it refused to ratify the whole plan was defeated. This Convention threatened to reject the Constitution because it contained no bill of rights. Washington with his usual spirit of wise compromise pointed out that if the body of the instrument were once adopted it provided a method by which the States could add the guarantees as amendments. Thus Massachusetts was persuaded to ratify and at the same time proposed amendments respecting personal liberty that were to be submitted to the States by the First United States Congress. Seven of the States ratified practically on Washington's promise of a bill of rights. The people plainly attached as much importance to their ancient liberties as they did to law and order . . . and credit.

Upon the organization of the new Federal Government, the States proposed one hundred and twenty-four amendments for a bill! They were of the most miscellaneous character.

Early in June, 1789, Mr. Madison introduced in the first session of Congress a series of amendments embracing the most important of the propositions recommended. . . After a long debate in which not a few changes were effected, seventeen amendments finally passed the House. . . Two of these were rejected by the Senate, one affording protection to the individual against a State, and the other regulating the

[15] Elliot. *Debates.* III, p. 316, 445-9; II, p. 65-160, 243; T. Jefferson. *Works.* III, p. 201; J. Story. *Commentaries.* I, p. 277; T. M. Cooley. *Constitutional Limitations.* p. 315; Charles Borgeaud, *Adoption and Amendment of Constitutions in Europe and America;* J. B. McMaster and F. D. Stone. *Pennsylvania and the Federal Constitution.*

distribution of power among the departments. The remaining fifteen were reduced to twelve . . . and the series of twelve went out to the States (September 25, 1789). Subsequently the series except two were ratified by a sufficient number of States.[16]

The Bill of Rights amendments were proclaimed in force December 15, 1791. So by the back door the liberty guarantees got into the Constitution.

One of the amendments rejected by the Senate was declared by Mr. Madison to be "the most valuable of the whole list." It read:

> No State shall infringe the equal rights of conscience nor the freedom of speech, or of the press, nor the rights of trial by jury in criminal cases.

This would have enlisted the United States to protect the liberties of a citizen against his State. The Federal guarantees do not achieve this.[17]

In short, in these Bills of Rights the Americans affixed to their Puritan-born natural rights doctrines, their tested English "rights" at law. They did not over closely scrutinize their real situation nor seem to realize the new implication of their scheme of popular government. All their Declarations looked back to England, and set up rights against a King, not the rights of a citizen against his own democratic government. Some parts of the Bills were therefore obsolete when written. Other parts are made up of abstract and ambiguous moral rules and political theories. Still others

[16] Ames, H. V. *The Proposed Amendments to the Constitution.* p. 184 and note, 185, 190, 277; *Annals of Congress,* I, p. 424, 437, 755.

[17] "The fact that an amendment protecting the individual from State encroachment was included in the series . . . would seem to indicate that the members of the First Congress considered the first ten amendments binding only against the general government. The question as to the extent of their application has frequently come before the United States Supreme Court, and that body has repeatedly declared that the first ten amendments do not guarantee the individual against the State." Ibid. p. 184. See Taylor, *Origins of the Constitution.* p. 229. The ruling has been made in Barron v Baltimore, 7 Peters 243; Fox v Ohio, 5 How. 410; U.S. v Cruikshank, 92 U.S. 542; Spies v. Illinois, 123 U.S. 131.

were the hasty inventions of a period of danger rather than the products of careful political reasoning. They are after all only expressions of good will and faith, getting such power as they have from the current public belief in them.

CHAPTER V

IDEALS UNDERLYING THE CONSTITUTION

Civil liberty rests at bottom not upon paper guarantees but upon the spirit of a people. The sanctions in the hearts and heads of those who framed and first enjoyed the blessings of these ancient liberties must be studied for their meaning. The constitutions never embodied any immutable axioms for which the people would sacrifice their temporary desires or purposes. Liberty must be interpreted in relation to the age.

Now the people of the United States have never been greatly concerned with abstract civil liberty, though probably more concerned than most other peoples. The nation was not founded, as is sometimes preached, to preserve any high-flown personal liberties. The "liberty of the founding Fathers" meant chiefly the liberty belonging to the owners of a country, freedom to run their own affairs without domination by alien King or Parliament. The first state constitutions were indeed full of libertarian doctrines. But though we still talk about this liberty of the early Revolution, what we got was the much more prosaic brand of the Federal Constitution. The gap of fifteen years between reach and grasp witnessed a direct reversal of social impulse from the iconoclasm of overthrowing a bullying King to the legal-minded caution of founding a native state. '76 quickened with change, but '91 bore the conservative twins, Law and Order.

The people, then as to-day, thought the new nation

had created new and splendid liberties, an illusion fostered by several facts: they had won liberty from the Crown; they had in fact constructed a novel form of government; they had set up an ideal of universal democracy wherein all white men were supposed to enjoy perfect equality, though this might be the equality of slaves. Castes seemed to have disappeared; unrestrained economic competition was possible. All these achievements were promptly confused with civil liberty.

During the Revolution patriotic need made us enhance the native quality of our liberties at the expense of their hated English source. The Fathers wisely perceived that to cultivate a sturdy feeling of nationality we had to hate some other nation. They encouraged youthful pride to deny that we could have inherited our ideals of liberty from the people who had denied us liberty.[1] Americans were also taught to believe that because the land was settled by dissenters, they were the natural heirs of liberty. They forgot that dissent implies its own harsh intolerance both of the established order and other dissents. They knew that they were a nation of pioneers, forgetting again that pioneers do not fight for civil liberty, but seek their own personal freedom in flight to the unbound edge of society. The American people did become "free" but freedom and love of liberty are not necessarily one, nor is a democracy inherently libertarian. But at the beginning the success of the democracy concealed some of its short-comings, and since then the enduring material welfare of the country has fostered the faith that there is some secret spring of liberty, potent and everlasting, in our hearts.

In sober fact the framers of the Federal Constitution did not worry about civil liberty, but set themselves at

[1] Stevens. *Sources of the Constitution.* p. 52.

the practical task of establishing a government of some sort and securing stability to retain the hard-won national independence. The purposes of the Constitution are very conservative and very utilitarian:

> . . . to form a more perfect Union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the Blessings of Liberty to ourselves and our posterity. . .

This includes Justice and the Blessings of Liberty, but this was, as we have shown, not primarily civil liberty, but independence of outside domination. The ruling purpose was an orderly and strong government for "domestic tranquillity" and "common defence." Such a purpose could not allow much liberty, and really sought by a series of compromises to limit the liberties already enjoyed both by the states and individuals.

Let us note further that law and order are not in the final analysis ends in themselves; they protect other purposes. Here the purposes were to perpetuate a society founded on the general moral ideas of Western Christian civilization, and to guarantee the right to own and inherit property. For these ends it was that the leaders wanted any government at all. These were the real "Blessings of Liberty" they sought to leave to posterity. Even democracy was not an end in itself, but merely a better way of distributing widely the blessings of this system. Christian morals, the monogamous marriage, private property as modified by the Anglo-Saxon to meet Colonial conditions—these were the natural ethics under our constitutions. As long as the United States remains Anglo-Saxon in tone any attempt to interpret the guarantees of liberty as granting the right to overthrow these bases of faith is not only futile but ridiculous.

This Christian ideal went deeper than the institutional symbol of a state church. It was the inner force of the people's life so that the very words of the guarantees of religious liberty breathe victory for the one true religion. The New England Colonists had always believed in government as ordained of God as the Fundamental Orders of Connecticut showed above.

They regarded the Bible interpreted by themselves as the foundation of the State. "There is undoubtedly," said John Eliot, "a form of civil government instituted by God himself in the holy Scripture, whereby a nation may enjoy all the ends and effects of government in the best manner."[2]

Several State Constitutions recognized Christianity explicitly; its ideas were implied in all.

Private property was fundamental. The "domestic tranquillity" and "general welfare" of the Federal Preamble meant at bottom protection for private property. This is really "law and order". The guarantees that have always been enforced have been those protecting a man's domicile, and assuring him against extensions of the right of eminent domain. These reflected fears which the Constitution-makers felt vividly and which found this somewhat involved statement in the first Constitution of Ohio (1802):

Private property ought and ever shall be held inviolate, but always subservient to the public welfare provided a compensation in money is made to the owners.

The attitude of the Federal Convention is thus described:

They were anxious above everything else to safeguard the rights of private property against the levelling tendency on the part of the propertyless masses. Gouverneur Morris declared: "Life and liberty were generally said to be of more value than property. An accurate view of the matter, nevertheless, would prove that property was the main object of

[2] Charles A. Beard. *American Government and Politics.* p. 18.

the government, certainly it ought to be one measure of influence due to those who were affected by the government." Mr. King also agreed that "property was the primary object of Society." [3]

No interpretation of any mere personal liberty has ever to date contravened the principle of the private right to own. The Constitution-makers sought protection for the individual in his property rights, not in his personal liberty, doubtless having observed that whoever possesses the first also enjoys the second.

The formal code for both Christian morality and private property as well as the rule for the interpretation of the guarantees of liberty, was the Common Law of England. This is important for two reasons: first, the constitutional guarantees were written and early interpreted in the light of this mass of historic popular laws; second, in all the subsequent history and interpretations of the guarantees common law ideals have played a part. In the beginning, however, the Common Law had to contend, especially in New England with the idea of law based upon God's will.

> Views of the Common Law were of a most rudimentary and incomplete kind. Magna Carta is taken as a supreme embodiment and expression of the latter. . . The theory of the transfer of the Common Law as subsidiary law at the beginning of the Colonies, is therefore, in its unmodified form, not a true statement of Colonial legal relations. There was an attitude, sometimes of apathy, of lack of understanding, sometimes of resistance or ignorement, sometimes, as in Maryland, of admiration and adherence from the first. [4]

But the Colonists gradually took up the ideas of the Common Law, especially those they could invoke to protect their liberties, such as the writ of habeas corpus.

[3] Charles A. Beard. *American Government.* p. 47; Eliot. *Debates.* V, p. 279. See Beard. *Economic Interpretation of the Constitution.*

[4] Charles S. Reinsch. *English Common Law in the American Colonies.* Bulletins of the University of Wisconsin, History Series, II, Part 2, no. 4, p. 15, 56 ff.

Thus arose the later pre-Revolution admiration which Reinsch declares

> . . . refers rather to the general principles of personal liberty than to the vast body of rules regulating the rights of contract and property. . . Most of the Colonies made their appeals to the Common Law in its character as a muniment of English liberty, that is, considering more its public than its private elements. (p. 58)

John Adams expressed the idea pithily in *Novanglus*:

> Our ancestors were entitled to the Common Law of England when they emigrated; that is to say, to as much of it as they pleased to adopt, no more. They were not bound to submit to it unless they chose.

They could use the public parts against their rulers, while for the private parts they often substituted their own legal ideas.

The mother country began a closer supervision of legal matters during the Eighteenth Century and there came a more general dependence on the private law principles of English jurisprudence. By the time of the Constitutions, Common Law ideas were usual, and doubtless most of those who sat in the Convention were familiar with its forms. So the guarantees of the English "rights" employed its phrases without further definition and carried with them the meanings attached by English courts and precedents. Moreover the English Common Law was assumed as part of the social fabric and was guaranteed to the people by several State Constitutions.

No Common Law of the United States existed, since the nation had no previous legal history as a unit, and the States each accepted a local modification of the English form. Nevertheless it may with some justice be said that Blackstone in the Commentaries, 1768, is the best legal commentator on the principles of the Federal Constitution. So strong was this tradition of a

Common Law that until 1813 repeated efforts were made to establish the Common Law of the United States as a basis for Federal jurisdiction over certain kinds of crimes. For several decades, and in some fields almost to the present, liberty has had to struggle to keep the new and broad "freedoms" asserted by the bills of rights from being emasculated by the narrow rules of English law.

We pass next to the most important general ideas of that day—the profound popular conviction that all law rose out of the will of the people, however temporary and uncertain this might prove. The nature of majority rule in democratic procedure has deeply affected the value of the guarantees of liberty. Bills of rights may protect the people against executives; legal forms may protect them against tyrannical judges, popular anger against partisan legislatures, but nothing can protect the people against themselves. Too often they have held that since they created the constitutions they could abrogate them, or suspend them in whole or in part, by law or sometimes by mob violence, and oftenest in times of excitement when these guarantees of rights are most needed. The majority can always be persuaded that some minority is endangering the existence of both the state and its constitution. Inside the majority there always exists a powerful group ready to claim the right to preserve the community, with or without the constitution. Hamilton clearly foresaw this dependence of liberty upon the will of the people. "And here, after all, in public opinion and on the general spirit of the people and the government, must we seek for the only solid basis for all our rights." (The Federalist, LXXXIV.)

This conception of direct power was woven in the

State Constitutions and must be faced as part of the spirit of the people. It had even driven many of the Colonists from England and grown strong amid the necessities of small and isolated pioneer communities, far removed from central and effective authority. They had made and enforced their own laws. The nature and devices of the Revolution confirmed their faith. They saw that they had come safely through a crisis when their own natural power had worked for good against ancient law and allegiance. The Revolution was remembered in part simply as one way of making your constitution prevail against the other fellow's,—and no decisions of the Supreme Court as umpire could wipe out that memory.

The "Committees of Correspondence and Safety" were agents of direct action, whether of the majority or not, no one now can tell. They abolished guarantees, and the prerogatives claimed for them are significant in the entire subsequent history of civil liberty in the United States. Their high-handed proceedings, not only against Tories, but against unpopular persons generally, have not been featured in the school histories of the country. Yet they helped form our tradition of mob violence. "Lynchers," Vigilantes, the Ku Klux Klan, and "Citizens' Committees" found here their germ and first expression.[5]

Finally, the constitutional guarantees then as now were not the same to all men. Civil liberty was not a standard of which these clauses were precise descriptions. Each group had a different notion of what the guarantees could be made to mean, and to whom they applied. There was no unaminous public opinion back of the Constitution. Several members of the Convention

[5] J. E. Cutler. *Lynch Law.* Opening chapters.

refused to sign it. The people were fearful. John Fiske says: "There was much opposition to it, because it seemed to create a strange and untried form of government which might develop into a tyranny." Sectional jealousy mistrusted the union. Consider liberty in Puritan Massachusetts and slave-holding South Carolina! There is a note of fear from the secret discordances of the Convention, through the obstinate ratification of only nine States in two years, to the miscellany of one hundred and twenty-four liberty amendments for the Bill of Rights. On the liberties of the "subject",—the established middle-class "rights",—the constitution-makers were perhaps agreed. Against any newer liberty, the right to think or to change anything they were even more agreed. This they called "license" and dreaded as the gravest threat to popular government.

The approximate meaning of these middle-class, Anglo-Christian liberties we shall now examine, one by one, as they looked in 1791.[6]

[6] "The best rule for interpreting the technical terms employed in the Constitution, as the Courts have declared repeatedly, is to give them the meaning they had at the time the instrument was framed and adopted. When the terms are technical law terms, they are to be given the meaning attached to them in the English Common Law." See W. W. Willoughby. *United States Constitutional Law.* Chap. II, "Principles of Constitutional Construction." The best general discussion of the liberty guarantees is T. M. Cooley, *Constitutional Limitations.* The definitions in Joseph Story. *Commentaries on the Constitution* are nearer to the actual period of the Constitution. Hannis Taylor in *The Origin and Growth of the American Constitution,* Chap. VIII and IX, discusses the Federal Bill of Rights. Ernst Freund, *Police Power,* states the case for the state as a regulatory body from a modern point of view.

CHAPTER VI

RELIGIOUS LIBERTY

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise, thereof . . .

First Amendment to the Constitution

. . . all officers, both of the United States and the several States, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

Article VI, Clause 3 of the Constitution

Constitutional religious liberty was first realized in America; and it is more than any other civil liberty an American creation.[1]

The English Constitution contains no dictum on religious liberty. A guarantee of freedom of conscience was included in the Bill of Rights of the Puritan Army Constitution offered to the Parliament in 1647, but never enacted.[2] This province was protected by the various Toleration Acts beginning in 1688. Discriminations and disabilities for religious reasons endured in England for years after they had been ended in America.

The very foundation of many of the Colonies was the desire of the original settlers to worship according to their consciences. Puritans, Quakers, and Huguenots, fled from religious persecution. It is true that the lib-

[1] "This pure Religious Liberty may be confidently reckoned as of distinctly American origin . . . and may be justly rated as the great gift from America to civilization and the world." Cobb, S. H. *The Rise of Religious Liberty in America.* p. 2. See also Stevens. *Sources.* p. 217; Jones, C. Fenton. *Religious Liberty in Virginia.* For larger views of the entire problem see Brook, Benjamin. *The History of Religious Liberty to the Death of George III.* 2 Vols., and Draper, J. W. *History of the Conflict between Science and Religion.*

[2] See page 26.

erty they sought was only for their own dissent and they were often intolerant and cruel toward other dissents. Scarcely two decades after the Pilgrim fathers set up their Massachusetts theocracy, the Reverend Henry Dunster, first president of Harvard College, was indicted by the grand jury, convicted of breaking the peace, sentenced to receive public admonition on lecture day, and put under bonds for future good behavior, because he had preached against infant baptism! Later his resignation was forced, and his successor was chosen after an explicit submission to the orthodox code. But the fact remains that the Colonists all understand the *principle* of religious liberty from their own narrow angle; and soon the necessity for compromise among so many strongly religious groups began to generalize the individual experience into a deep and genuine sense of religious liberty.

By 1637 Roger Williams had made a beginning with his Rhode Island Company who agreed to submit to government "only in civil things." And in 1640 they made an explicit reservation of religious liberty. In 1649 a written recognition of the principle was granted by authority in the Maryland Toleration Act, though its "liberty" was limited to Christians. It provided for the punishment, first of blasphemy and Sabbath-breaking, and then for such persons as shall call anyone within the Province, "an heretick, Idolator, puritan, Jesuite, Jesuited Paptist, Luthern, Anabaptist . . . or any other name . . . in a reproachfull manner relating to religion." Religious freedom was defined in these words:

> And whereas the enforcing of the conscience in matters of religion hath frequently fallen out to be of dangerous consequence in those commonwealthes where is has been practiced. . . Be it therefore enacted . . . that noe person or persons whatsoever within this province . . . professing to believe in Jesus Christ, shall from henceforth be in any waies troubled, Molested,

or discountenanced for or in any respect of his or her religion nor in the free exercise thereof . . . nor any way compelled to the beliefe or exercise of any other religion against his or her consent, soe as they be not unfaithful to the Lord Proprietary, or molest or conspire against the Civil Government.[3]

The last clause states clearly what has always been stated or implied in charters of religious freedom, that it does not license acts against the state. The multiplicity of sects shows one reason for tolerance, since they might all combine against one persecutor. The Act was repealed in 1654 and re-enacted in 1658, but *not* protecting Catholics.[4]

The sometimes inexplicable granting and repealing of these Acts, and the various exceptions in them, reflected the contemporaneous religious and political ups and downs in England. For example, the noble foundation clause of all future religious liberty in the Charter granted to Rhode Island in 1663, was written while the King was busy proscribing the non-Conformists at home, and probably was included from a desire to irritate the Anglicans in England and the Puritans in New England from which Rhode Island had fallen away. The Charter reads:

. . . and because some of the people and inhabitants of the same colonie cannot, in their private opinions, conform to the publique exercise of religion, according to the litturgy, formes, and ceremonies of the Church of England, or take or subscribe the oaths and articles made and established in their behalf; and for that the same, by reason of the remote distances of those places will (as we hope) bee noe breach of the unitie and uniformitie established in this nation . . . doe hereby . . . ordeyne that noe person within the sayd colonie, at any time hereafter, shall bee in any wise molested, punished, disquieted, or called in question, for any differences in opinione in matters of religion . . . but that all and everye person and persons may . . . freelye and fullye have and enjoy his and theire own judgments and consciences in matters of religious concern-

[3] An Act Concerning Religion. See J. T. Scharf. *History of Maryland.* p. 174-6; and Theo. C. Gambrall. *Lectures on the History of Maryland.* p. 99-119.

[4] Political discrimination against Jews existed in Maryland as late as 1828. See E. L. Harris. *Church and State in the Maryland Colony.*

ments . . . they behaving themselves peaceably and quietly, and not using this libertie to lycentiousnesse and profanesse, nor to the civill injurye or outward disturbance of others. . . [5]

In Pennsylvania, William Penn's "Frame of Government" (one in 1683, a second in 1701) provided that whoever believed in one Almighty God should not be molested or caused to frequent or maintain any religious worship; political rights were thus limited:

All persons who profess to believe in Jesus Christ the Saviour of the World, shall be capable to serve this government in any capacity, both legislatively and executively. [6]

These principles still existed in the first Constitution of Pennsylvania in 1776.

Religion meant Christianity, and toleration was for its sects. Other faiths were not religious at all, so no liberty existed for the Indian and his myths or for the negro. There was no established Church in Pennsylvania, but the Quakers insisted on the above religious tests, simply in the interests of Protestantism: "Protestantism was established in a sense . . . the Quakers shared the general view of Protestant Christendom that only Christians of the Protestant persuasion were fit for public office or citizenship." [7] So Catholics and Jews were often denied political rights. New York excluded both from suffrage; Rhode Island itself did not grant Catholics the vote until 1788. The Charter of Georgia, 1732, puts it naively:

. . . For the greater ease and encouragement of our loving subjects . . . we do ordain, that forever after, there shall be a liberty of conscience allowed in the worship of God, to all persons inhabiting . . . and that all such persons, except papist, shall have a free exercise of religion. [8]

[5] Poore. *Charters.* II, p. 1594.

[6] *Ibid.* II, p. 1541, Sec. II. Declaration of Rights.

[7] Cobb. *op. cit.* p. 449.

[8] Poore. *Charters.* I, p. 375. As a result, at the opening of the Revolution there were not more than 1300 Catholics between Maine and Florida.

The religious liberty of each Colony was an individual thing enjoyed only by its members. The predominant sect in one Colony was therefore often absolutely intolerant of the others; and proselyting was anathema. Witness the executions of the Quaker evangels in Boston (1659-1660), ending with the hanging of that determined martyr, Mary Dyer, who, being offered her life as she stood at the foot of her gallows if she would remove to Rhode Island, replied: "Nay, I cannot. In obedience to the will of God I came and in his will I abide faithful to death." Her body swinging in the wind brought from Humphrey Atherton the tribute—"She hangs there like a flag."

What Puritan intolerance meant is shown by this list of persecutions of Quakers during these years, as recorded in a petition to the English king:

> 2 women paraded naked, 23 whippings, 2 beaten with pitched ropes, 25 banished on pains of a fine of 1000 pounds, 1 had H (for heretick) burned in his palm, 3 had their right ears cropped, 2 were sold as bond servants.[9]

The witch burnings also show the harshness and intolerance in non-religious fields. There was no respect for any kind of free-thinking. Benjamin Franklin and Thomas Jefferson suffered in popularity for their liberal views on religion; and the wise Franklin's invention—the lightning rod—was actually opposed on religious grounds. The question of innoculation in Boston in 1721 provoked a vigorous controversy, partly religious, partly scientific. Dr. Nabdiel Boylston suffered persecution, and no less a light than Cotton Mather had a very modern bomb

[9] Jones, R. M. *The Quakers in American Colonies.* Chap. IV, p. 87 ff., 91; Bishop, George. *New England Judged* (1703); Palfrey, J. G. *History of New England.* II, p. 461-93; Hallowell. R. P. *The Quaker Invasion of Massachusetts.*

thrown into his house. The dissection of human bodies was attacked as vivisection has been since.[10]

State churches existed in several Colonies. Congregationalism was established in colonies of Massachusetts, New Hampshire, and Connecticut. The Church of England was recognized as the state church of Virginia. So in 1768, certain Baptists in Spottsylvania county were defended by Patrick Henry against a charge of "preaching," which was forbidden by the law. And six years later, James Madison wrote:

> That diabolical, hell-conceived principle of persecution rages among some. . . There are at this time in the adjacent county no less than five or six well meaning men in close jail for publishing their religious sentiments which in the main are very orthodox.[11]

Many severe colonial laws against blasphemy remained on the statute-books into the nineteenth century. In short, absolute religious liberty did not exist in the American colonies any more than absolute principles exist anywhere in life. But the ideal lay deep in the hearts of the people, and a wider liberty was attained in America than anywhere else in the world.

One of the few acts of the first national American body, the Continental Congress of 1774, was an "Address" to an alien and Catholic colony, Quebec, showing that religion was no bar to political union. When the Colonies became *States* overnight, the principle found immediate constitutional expression in the famous sixteenth section of the Virginia Declaration of Rights, (1776) written, it is believed, by that eternal libertarian, Patrick Henry:

> xvi. That religion or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by

[10] White, Andrew D. *The Warfare of Science and Religion.* I, p. 366; II, p. 49, 55, 56. This volume studies the conflicts arising when new views of natural phenomena forced the recasting of theological dogma.

[11] Cobb. *op. cit.* p. 490; Rives. *Life of Madison.* I, p. 44; *Letters.* I, p. 12.

reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion according to the dictates of conscience, and that it is the spiritual duty of all to practice Christian forbearance, love and charity to each other.

Many of the original State constitutions guarantee religious liberty; but this liberty meant many different things. For example:

When the American Union was formed . . . in only two of the thirteen States was full and perfect freedom conceded by law—Rhode Island and Virginia. Six, New Hampshire, Connecticut, New Jersey, both Carolinas, and Georgia, insisted on Protestantism; two were content with the Christian religion, Delaware and Maryland; four . . . required assent to the divine inspiration of the Bible; two demanded a belief in Heaven and Hell; three . . . excluded ministers from civil office; two emphasized belief in one eternal God; one required assent to the doctrine of the Trinity; and five, New Hampshire, Massachusetts, Connecticut, Maryland, and South Carolina, adhered to religious establishments. In one, South Carolina, the obnoxious term *toleration* found a constitutional place.[12]

On the other score, the Massachusetts Constitution of 1780 refused religious tests for office in an elaborate statement of the principle of freedom; and in October, 1785, the Virginia Assembly passed the celebrated "Statute for Religious Liberty" written by Thomas Jefferson of which he was so proud that he inscribed his authorship in his epitaph. The statute follows:

Preamble: Whereas God hath created the mind free . . . our civil rights have no dependence on our religious opinions; that therefore the proscribing any citizen as unworthy the public confidence by laying upon him an incapacity of being called to office of public trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which in common with his fellow-citizens he has a natural right; that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on the supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty, because he being of course judge of that tendency, will make his opinions the

[12] Cobb. *op. cit.* p. 507.

rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own; that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order; and finally that truth is great and will prevail if left to herself, that she is the proper and self-sufficient antagonist of error and has nothing to fear from the conflict;

II. Be it enacted by the General Assembly, that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced or restrained, molested or burdened in his body or his goods, nor shall otherwise suffer on account of his religious opinions or beliefs; but that all men shall be free to profess and by argument maintain their opinion in matters of religion; and that the same shall in no wise diminish, enlarge or affect their civil capacities.[13]

This is the final word on freedom of thought and discussion, whether religious, scientific, or political, and applies as perfectly to-day as it did then. The guarantee of religious liberty is now found in practically all the State constitutions.[14]

When we turn to the United States Constitution we find no mention of any supreme power, and the sole references to religion are the First Amendment and the clause forbidding test oaths and affirmations.

This section gave rise to much debate [in the State conventions for ratifying the Constitution]. On the one hand, it was not regarded as furnishing a sufficient guarantee of religious freedom; and on the other, it was feared as giving entrance to a liberty which might endanger the commonwealth. New York, New Hampshire, Virginia, and North Carolina insisted on a larger statement for religious liberty. The First Amendment

[13] Hening, W. *Statutes of Virginia.* XII, Chap. XXXIV, p. 84, 85, 86, from Revised Bills of 1779, Chap. LXXXII. Jefferson. *Works.* I, p. 45; II, p. 355; VIII, p. 113.

[14] Stimson. *Constitutions.* p. 137 gives the present provisions: "In all the States except Alabama religious rights are recognized . . . by the Constitutions in slightly varying terms . . . but provisions . . . are not to excuse acts of licentiousness or to justify practices inconsistent with the peace and safety of the State (19 States), or polygamy (2), or bigamy, or advice and propaganda thereto (4), nor to excuse disturbance of the public peace (4), nor to justify practices inconsistent with the rights of others (3). No person is to disturb others in their religious worship (4)." See also Cooley. *Constitutional Limitations.* p. 579, note, and Cobb, *op. cit.* p. 517-20

did not then exist. The minority in Pennsylvania wished to reject unless such a guarantee was incorporated. . . In Massachusetts alone was a dread of liberty expressed.[15]

Though there were twenty-four ministers in the Massachusetts convention, few opposed the Constitution for its omission of religious tests or of a reference to a supreme being. Instead the Reverend Mr. Backus declared: "Religious tests are the greatest engine for tyranny in the world."

The States seem to have been of one mind in desiring a federal guarantee of religious freedom, and the First Amendment was adopted by Congress without opposition. The form used has proved admirable, for it requires no dubious interpretation of "religious liberty" or "freedom of conscience." Congress is simply forbidden to pass any law at all with respect to religion.[16]

The Meaning of Religious Liberty

Even in 1791 freedom of conscience meant something more than a man's right to think his own thoughts, to hold an inward belief. That right we know is as organic as the right to breathe. Herbert Spencer says:

> Freedom of belief as a right is absurd; since by no external power can it be taken away. . . It cannot really be destroyed or changed by coercion from within. . . What is meant is, of course, the right freely to profess belief.

[15] Cobb. *op. cit.* p. 508; Elliot, J. *Debates.* II, p. 119, 148.

[16] Since 1791, the Constitution has been proof against all endeavors to include in it a recognition of a supreme power or of Christianity. Such an endeavor was in the following petition to Mr. Lincoln in 1864, proposing to amend the Preamble to this form:

> WE, the people of the United States humbly acknowledging Almighty God as the Source of all authority and power in civil government, the Lord Jesus Christ as Ruler among nations, His revealed will as the supreme law of the land, in order to constitute a Christian government, form a more perfect union, et cetera . . .

here reappears the original Colonial ideal of the State based on the Christian fellowship. But though the proposal was backed by an association of wide and prominent membership, it achieved nothing, and Cobb says: "The long sustained efforts to obtain a religious amendment to the Constitution have been alike idle and unnecessary." See *op. cit.* p. 579; and *Proceedings of the National Convention for the Amendment to the Constitution.* January, 1872.

Beyond this elemental right, the Constitution guaranteed equality to all men and sects in their right to profess belief and organize worship. This ideal of equality has arisen in large measure from the very present need for toleration among so many vigorous sects during 150 years of Colonial life. They had reduced their asperities from a common desire to survive, if not from a conscious charity. Even pagan worships were not absolutely forbidden provided they neither demanded nor encouraged *acts* against the State or against Christian morality.

> They have not established religious toleration merely, but religious equality, being far in advance not only of the mother country, but also of much of the colonial legislation, which though more liberal than that of other countries, nevertheless exhibited features of discrimination based on religious beliefs or professions.[17]

This is more than religious toleration, for as Cobb points out:

> It asserts that all are equal while religious toleration assumes that all are not equal, that one form of religion has a better right, while for the sake of peace it consents that those who differ from it shall be allowed to worship, as shall best please themselves. "Toleration is not the opposite of intolerance, but it is the counterfeit of it. Both are despotisms: the one assumes to itself the right of withholding liberty of conscience, the other of granting it."[18]

To give meaning to this equality the state must be neutral. It must be separated from the churches. This technical removal of the church out of the frame of government was achieved at once for the Union by the First Amendment, and in perhaps a generation for the individual states. But the separation of the underlying Christian code from the mind of the law-maker and judge has not even yet been secured.

[17] Cooley. *Constitutional Limitations.* Chap. XIII, p. 576.
[18] Cobb. *op. cit.* p. 6, quoting Paine, Thomas. *Rights of Man.* p. 58.

There never has been a government which had complete separation from religion. Even in America the present separation is complete only in theory, not in practice. In most countries the word "church" symbolizes one aspect, the word "state" another aspect of the same thing.[19]

It may be noted here that throughout American history, the will of the state has in the last analysis been regarded superior to the dictates of religious faith, *in the regulation of actions.* The assertion of the superiority of the civil government over all the acts of its citizens, even when justified by religious ordinances, is found in the earliest charters, and in a sense emasculates them all. For example, in the Maryland Toleration Act, religion would not excuse anything "unfaithfull to the Lord Proprietary, or to molest or conspire against the civil government"; and the Rhode Island Charter declares that the religions must behave peaceably and quietly, nor use their liberty "to lycentiousness and profanenesse." Later the new States incorporated the same proviso. Article XXXVIII of the Bill of rights of New York (1777) is thus worded:

The liberty of conscience hereby granted shall not be so construed as to excuse acts of licentiousness, or to justify practices inconsistent with the peace or safety of this State.

Similar limitations on absolute freedom of action are found in many of the present State Constitutions. Moreover the Courts apply the dictum whether it is found in the charters or not. The following formula well expresses the idea:

Religion and speech and press are primarily free, but that does not prevent them from being subjected to restraints in the interests of good order or morality.[20]

This is more important than most people think. For if a man cannot *act* in accordance with his religious be-

[19] Schroeder, Theodore. *Free Speech Defined and Defended.* p. 47.
[20] Freund, E. *Police Power.* p. 11.

lief unless that agrees with the State's definition of order and morals, then either his religion is reduced to a mere quiescent mysticism, an inward psychological state, or else itself conforms to the State's morals. Oftener than not the State's morals are survivals of Christian dogma, and so in a sense there is a subconscious re-establishment of the Church. What has really been achieved is a degree of religious indifference that cares little what any man believes or how he worships, but is certain that in practical present matters the State's police power must be superior to God's will. This aggrandizement of the State and denial of religion as guide to action may prove fatal to civil liberty. For we saw that such liberty arose out of men's assertion of the right to act according to their own conscience even against prince or pope. But as the State extends its dictatorship, if it refuses to recognize any real dependence of the individual on God's will through his conscience, there will be no basis of dissent from the State's law and personal liberty will vanish.

In the beginning, however, a practical separation was achieved which is thus defined:

> Neither should the church dictate to the State as having peremptory spiritual jurisdiction over things civil; nor should the State interfere with the church in its freedom of creed or worship, in its exercise of ordination and spiritual discipline; nor yet again should the individual be subjected to any influence from the civil government towards the formation or refusal of religious opinions or as regards his conduct, unless such conduct should endanger the moral order or safety of society. . . The church is limited to the cultivation in the citizen of those virtues of order, truth, and righteousness which shall mold good citizenship; while the State is confined to adjudicating such questions as involve the rights of property and of ecclesiatical corporations voluntarily formed under the statute law.[21]

[21] Cobb. *op. cit.* p. 2 and 12. See Schroeder, T. *Free Speech Defined and Defended.* p. 47.

The rules deduced from this division of sphere, though not of function, are these:

There shall be no religious establishment by a law of the State. No man can be compelled to support religious instruction against his consent, by taxation or otherwise,—with a few exceptions as in Massachusetts and New Jersey. No compulsory attendance can be enforced, since the conscience alone can enforce the religious sentiments and no restraints shall be placed on the freedom of worship according to conscience. Generally, no restraints shall be put upon the expression of any belief concerning religion, since the believer or non-believer usually holds it a duty to propagate his ideas and convert others to this view both for his own good and their good. This is denied by provisions in Idaho and Montana not only against the practice of bigamy, but also against propaganda in favor of bigamy. No person shall be disparaged in the eyes of the law in his social rights on account of his religious belief. "It is believed that where limitations on persons exist they are not often made use of to deprive any person of the civil or political privileges which are placed by the law within the reach of his fellows." [22] In this, equality is different from toleration for under the latter while a man might not be attacked or persecuted positively, he was discriminated against by the denial of certain prerogatives and privileges granted the favored sect.

"These protections do not, however, prohibit the State from such recognitions of a superintending Providence in public transactions and exercises as the general religious sentiment of mankind requires . . . so no principle of constitutional law is violated when thanksgiving or

[22] From Cooley. *op. cit.* p. 580-1.

fast days are appointed, chaplains appointed, Congress opened with prayer, etc." [23]

But despite the fact that the Federal charter permits no reference to a supreme power to violate its austere religious neutrality, and despite the above principles, the United States at its inception and since, has been a Christian nation. An early justice of the Supreme Court states the sentimental bias:

> Probably at the time of the adoption of the Constitution and of the amendments . . . the general if not the universal sentiment in America was that Christianity ought to receive encouragement from the State so far as was not incompatible with the private rights of conscience and the freedom of religious worship . . . . An attempt to level all religions and to make it a matter of state policy to hold all in utter indifference would have created universal disapprobation, if not universal indignation . . . The real object of the Amendment was not to countenance much less advance, Mahometanism, or judaism, or infidelity by prostrating Christianity, but to exclude all rivalry among Christian sects and to prevent any ecclesiastical establishment. [24]

Judge Cooley states the legal bias, equally sure that the States are based on Christian morals:—

> The criminal laws of every country are shaped in a greater or less degree by the prevailing public sentiment as to what is right, proper, decorous, or the reverse; and they punish those acts as crimes which disturb the peace and order, or tend to shock the moral sense, or the sense of propriety and decency of the community. The moral sense is largely controlled by the religious belief and therefore it is that those things which, estimated by a Christian standard, are profane and blasphemous, are properly punished as crimes against society, since they are offensive in the highest degree to the general public sense, and have a direct tendency to undermine the moral support of the laws, and to corrupt the community. [25]

This was the almost universal belief when the constitutions were framed, save among a few free-thinkers.

[23] Ibid. p. 583.

[24] Story, Joseph. *Commentaries on the Constitution.* III, Chap. XLIV, sec. 1868, 1871.

[25] Cooley. *Constitutional Limitations.* p. 583-4.

So perhaps the twenty-four Massachusetts clergy felt it impolitic as well as unnecessary to quibble for the triune God in the Federal charter when every clause was founded on this sub-stratum of Christian morals. It established and protected social ideals that were blood of the blood of Anglo-Saxon orthodoxy. This implicit and almost subconscious faith of the founders in the basic Christianity of their government is even deeper than their explicit faith in the institutions of private property. For they felt that the Christian Church was the final sanction and guarantee of a right popular attitude, not only toward the Immaculate Conception, but toward ownership, inheritance, and monogamy. The States were Christian not in but *beneath* their constitutions.

We point out again that the essence of the constitutional liberty of 1791 was inspired and bounded by religious liberty. Testimony is unanimous that freedom to believe anything developed the spirit of freedom to say, print, or do anything with no reference to king or pontiff.

> Freedom in one thing is the natural progenitor and supporter of freedom in another, and it needs no argument to show that freedom of conscience was the natural forerunner and ally of the freedom of the citizen. Inasmuch as free enquiry passed from religious to secular subjects in the Colonies just as it did in England though without revolution and civil commotion, any enquiry into the causes of our political freedom must necessarily embrace the contemplation of what free enquiry did in America when it turned from religion to politics.[26]

Jellinek states it thus:

> The right of liberty of conscience was proclaimed and with it came the conception of a universal right of man. In 1776 this right was designated by all the bills of rights mostly in emphatic form and with precedence over all others as a natural and inherent right. The idea of legally establishing inalienable, inherent and sacred rights of the individual is not of political

[26] Scott, E. G. *Development of Constitutional Liberty in the English Colonies in America.* p. 59.

but religious origin. . . In reality the fruit of the Reformation and its struggles.[27]

Chancellor Kent, conservative enough, makes this very profound observation:

Civil and religious liberty go hand in hand and the suppression of either of them for any length of time will terminate the existence of the other.[28]

[27] Jellinek. *op. cit.* p. 75.
[28] James Kent. *Commentaries.* I, lecture XXIV.

CHAPTER VII

FREEDOM OF SPEECH AND OF THE PRESS

Congress shall make no law . . . abridging the freedom of speech, or of the press. . .

First Amendment to the Constitution.

Freedom of communication is the best term for the general principle that the individual should be free to express his thoughts to others. The applications of this principle indicate only differences in the means of communication. The two principal aspects are freedom of speech and freedom of the press. Connected with these in modern civilization is freedom of all forms of mechanical communication, the mails, the telegraph, the telephone, the motion-picture and the radio. Freedom of communication may be roughly defined as the right of the individual to communicate to others by any means whatever any thoughts he may have, to urge them as true and good, to secure their acceptance, and generally to produce some action based upon them. Freedom of speech is the natural origin to these other liberties, and its axioms will make clear the principles of them all.

Freedom of Speech

Freedom of speech is only less elementary than freedom of thought. There is a social urge to talk almost as powerful as the psychic necessity of thinking. Speech can be controlled but it is not always possible. Sometimes men *must* speak. The English Constitution did not concern itself with guaranteeing so ancient and natural a right. It was assumed as one of the "absolute

rights" of the subject. It conceived, moreover, no difference between private speech and public speech.

Three points-of-view toward freedom of speech need emphasis. First, it may be considered as the right of a man simply as a human being; to express himself is a function of his existence in society. By talking he preserves his identity. Clearly free speech at this point arises out of freedom of thought. Second, as the right of the citizen in relation to other citizens, and this is what is guaranteed by the English law. Third, as the right of a voter under a popular government who must be free to discuss his own institutions, his own representatives; and all proposed measures. This freedom was at least as old as the folk-meetings on which Anglo-Saxon institutions were based. This last sort of free speech was naturally of grave concern to the young American democracies, which had to extend the English conception as an essential of their governmental machine. That they keenly realized this is shown in the repeated grouping in a single clause of the Bills of Rights of the methods of democratic control—assemblage, speech, petition, and the press.

Although these recognitions of free speech existed, yet neither England nor the United States, even after the Revolution, expressly granted the right of the citizen to say anything he chose, to anyone, anywhere. That was pure "license" which many agreed must be limited. And these claimed limits upon free speech for the public good are its real problem. They express themselves in laws which act powerfully to restrain freedom by their threats of penalties. They descended generally from the Common Law and Courts of England, though with some American additions. We understand what the Fathers meant by freedom of speech only when we have

grasped these limitations as they existed in 1791, and the previous opposition to these legal limitations.

These legal limitations concern themselves with the language of speech, with its content and with its uses. Punishments for the language have been unusual. There were of course laws against swearing, profanity, and obscenity. In the United States such words were held to be criminal in themselves, moral nuisances rather than offenses against religion. There has been however an almost sure instinct against allowing speech to be restrained on account of mere form. For to demand a form approved by science or art would stop the mouths of the unlettered. The courts have occasionally discriminated against speeches or writings for language alone, punishing the "coarse or vulgar" expression of sex facts although permitting the dissemination of these identical facts in scientific phraseology. They have, on the other hand, sometimes contradicted this dictum in the field of art, and decided that the mere esthetic value of a picture will not protect it from charges based on statutes aimed at the pornographic and obscene. With respect to languages, in 1791, few differences existed, and though there have been attempts since to require English for certain prescribed uses, or to forbid the use of a foreign language in public connections, freedom to use any tongue has been the rule.

The chief limitations have been on the meaning of the words. The usual limitations enforced in England, and in part in the United States in 1791 were four in number. (1) Laws punishing words that injured a person or reputation, peace of mind, or purse, that is, spoken slander or printed libel. (2) Laws punishing reflections on the government, its head, or its officers, that is "seditious libel." This limitation, natural under a "di-

vine right" king, has always been disputed here because the first amendment must have abolished such crimes. Despite this, the Sedition Act of 1798 was upheld by the lesser Federal Courts under common law doctrine; the Supreme Court enforced the war measure of 1918; and several States have at various times enacted "sedition laws." (3) Laws punishing reflections upon the community's religion. In England such blasphemy was tried before the ecclesiastical courts as a crime against the established religion. There were two kinds: obscene blasphemy or attacks upon religion and morals; and seditious blasphemy which was regarded as an assault upon the King as a divine regent, head of both Church and State. Reflections upon his government were reflections upon God's wisdom and therefore blasphemous. (4) Laws punishing obscene words. In England obscenity had been originally a church crime since it concerned morals and salvation; but in the United States it was regarded as a nuisance, punishable as was blasphemy in certain States, for its possible effects in increasing vice and crime especially among the young.[1]

What these limitations meant in 1791 was largely a mixture of old laws mostly from England, and the contrary tradition, the latter struggling amid new popular conceptions arising from the democratic method. Plain libel was coming to be held a private matter, and the laws were slowly being liberalized. Two cardinal doctrines for freedom were being asserted, though their establishment in the States was a process of decades. These were that the jury and not the judge should decide whether words were actually libellous; and second, that the truth published for good motives should be ad-

[1] In recent years, information on contraception has been opposed as obscene on both grounds: that it is against religious precept, and endangers the welfare of the state.

mitted as an adequate defence against charges of libel. Respecting sedition two views existed: the one, that even a popular government must have the right to punish words calculated to bring it into disrepute and perhaps overthrow; the other, that the citizen cannot be guilty of libelling the government he has created or the officers he has elected as his servants. Blasphemy was still punished as a crime in certain of the States, but the passing of an established church meant that the United States and soon the individual States would give up policing religious opinion unless accompanied by subversive acts. There was however a wide feeling that public morals were based on the Christian religion and that whatever tended to undermine the religious sentiments would also undermine respect for the law as an expression of morality. The punishment for obscenity was also based partly on this idea.

Finally, the limitations upon the *uses* of words were of two kinds: first, that they must not produce crime or violence or tend to produce them; and second, that they must not be employed to further an unlawful conspiracy. The First Amendment was not held to protect incitement to violence, say by the leader of a mob even though no actual overt act resulted, nor the advocacy of assassination. The punishment is here primarily for conspiring, not for the words, which are merely the instruments. The conspiracy doctrine was not often invoked to suppress free speech at this date, that development coming later.

Absolute freedom of speech was limited also by the general idea of the natural dangers that may accompany unrestrained utterances, particularly in conjunction with public assemblage, such as a panic from the spreading of false rumors, or a breach of the peace. The executive

might forbid speech when as a result the hearers might be inspired to a riot, attack the speaker, or fall to fighting among themselves; or when they might come into conflict with the police or the rest of the community. The libertarian might object on the ground that sufficient force should be provided to protect a speaker and prevent breaches of the peace; but he had to admit that in practice such protection is not always possible. Sometimes there arises also a conflict of real interests, so that we cannot object to the New England laws which forbade a man, even out of sincere religious conviction, to interrupt a church service. The freedom of the worshippers, not his own, was at stake.

We may note that modern developments of this idea of conflict of interests exist in the police power ordinances aimed to insure the common good by forbidding street meetings that obstruct traffic, or by requiring that licenses be secured for the use of public places. The executive may then hold that the mere proposal to make certain remarks so clearly foreshadows public danger that he must deny the usual rights of assemblage and speech. This extension of power is manifestly full of dangers to liberty.

Let us now turn to the ideals held by the American people about the time of drafting the Constitution. The makers certainly had an intense interest in freedom of speech on public matters, and in public methods. So the guarantee of free speech certainly meant the discussion of vital issues, not merely the private murmurings which though they may be the origin of public discontent, are not dangerous to authority. Public speech is the only manifestation that can be reached; and public speech *needs* the guarantee of freedom, for it generally voices some sort of conflict with the established order,

and therefore tempts authority to suppress it. Public speech is the instrument by which the weak pleas of isolated individuals are transformed into the powerful demand of a strong group. It appears at a crisis and grows in power almost from the sound of its own voice. Its very effectiveness raises the cry that it be silenced.

Americans in 1791 had for years defended their right to speak against the British governors. They had learned the value of frank speech both as an aid to winning their independence and as an essential principle of popular government. Free speech meant the right to criticize and complain, to canvass the acts of public officials, and to debate the merits of all candidates and measures. The people were determined that no new tyranny should ever stop them from meeting and talking over their grievances, nor from urging changes in their government, piece-meal or in its entirety. It belonged to them; there was no outside judge; the choice was theirs even if free speech advocated the overthrow of the government. It is curious to see how this identification of people and government which in 1791 permitted the frankest criticism of the government had by 1917 developed into that tyranny of majority opinion that refused to permit the minority to question any act of government. The modern version of the Revolutionary doctrine would appear to be freedom of speech but for the majority only.

Freedom of the Press

Except for religious liberty, the clear and broad guarantee of freedom of the press is the most important contribution of America to civil liberty. Such freedom is not guaranteed in the English Constitution, but exists merely as an implied aspect of the absolute "rights of an Englishman." Cooley says:

It is mentioned neither in the Petition of Rights nor in the Bill of Rights: of so little importance did it seem to those who were trying to redress grievances in those days.[2]

Censorship had existed since the Star Chamber first feared the power of the printing-press, and against that censorship John Milton had thundered in his Areopagitica. The dangers of licensing are exemplified in one of the first Star Chamber decrees, thus:

That each printer must register; that no press be established outside of London save one at each great University; that the archbishop of Canterbury, the bishop of London, and others were to regulate the number of presses and printers; that with few exceptions, no book could be printed without license; that the Company of Stationers could enforce the act and imprison for punishment; that the number of apprentices was limited.

In the Seventeenth Century a member of Parliament was even refused the right to publish his own speeches.

Freedom from censorship before publication was finally obtained when the last of the Licensing Acts was allowed to lapse in 1694, and the Commons refused for four successive years to concur with the Lords in renewing the law. Then the device of authority by which a judge rather than a jury was permitted to determine that a libel had been published, continued what may be called a post-publication censorship for another hundred years until George Fox secured the Libel Acts of 1792 (32 *George III, c.* 60), under which the jury judged the law as well as the facts. A second device, the imposition of taxes on newspapers, was invented in 1711 and endured until 1855, sadly hampering the growth of the popular newspaper in England.

In similar struggles against censorships, against de-

[2] *Constitutional Limitations.* p. 518; also the chapter on freedom of the press (xii). The struggle between the Puritans and the Crown for freedom for their presses does not indicate the indifference here spoken of. See Milton's *Areopagitica* and Thomas Masson's *Life of John Milton;* H. R. Fox-Bourne. *English Newspapers.* I, Chap. I and II; T. B. Macauley. *History of England.* IV, Chap. XIX and XX; and S. R. Gardiner. *History of England.* VII, Chap. VII, p. 51 and Chap. VIII.

nials of the right of the jury to say what was libellous, and against destructive taxation, the American colonists learned the priceless value of a free press. But even before the Crown censorship, the Massachusetts theocracy exercised some local control over printing. The first press in America at Cambridge in 1639 was not free, but licensed. Religious books were censored for several decades. Quaker tracts were burned, and in 1661 a man was fined ten pounds merely for having in his possession a copy of John Lilburne's *Resurrection* and W. Duberrie's *Mighty Day of the Lord.*[3] A volume by Thomas Maule was suppressed in Boston in 1695. He was tried for printed libel but acquitted, and from that time the manuscripts for books were submitted only in special cases. No general right of a free press was recognized, though the Colonists had to do their own amateur suppressing, there being no extension of English censorships until 1662 when for several years the English Licensing Act of that date was enforced.[4]

The Crown governors next took a hand, and in 1671 Sir William Berkeley of Virginia made the remark that seems his chief claim to fame: "Thank God, we have neither free school nor printing-press, and I hope may not for a hundred years to come." Governor Effingham, also of Virginia, received in 1683 instruction "to allow no person to use the printing-press on any occasion whatsoever." Finally in 1686 and for fifty years thereafter, all Colonial governors were given power over the press in their charters of instructions from the crown in these identical words:

[3] Bishop. *New England Judged,* and *History of America.* I, Chap. VI and VIII; Justin Winsor. *Narrative History of America.* V, p. 121; Moses C. Tyler. *History of American Literature.* I; Isaiah Thomas. *History of Printing in America.* I, p. 219.

[4] Hening's *Statutes.* II, p. 516; R. Hildreth. *History.* II, p. 171; Tyler, *Literary History of the American Revolution.*

> And for as much as great inconvenience may arise by the liberty of printing within our said territory under your government, you are to provide all necessary orders that no person keep any press for printing, nor that any book, pamphlet, or other matter whatsoever be printed without your especial leave and consent first obtained.

Resistance in several Colonies against this blanket power of censoring was one of the causes of the Revolution.

The first newspaper in America, *Publick Occurrences,* Boston, 1690, was suppressed after a single issue by the governor and council of Massachusetts, who declared their "high resentment and disallowance" of its publications on local and military matters. They declared that it came out contrary to law, and strictly forbade "anything in print without license first obtained from those appointed by the government to grant the same." The first printer in Pennsylvania was also commanded to print nothing without license from the council. He resisted, but discouraged by the struggle left the Colony in 1693. In 1704 printing in Boston was still "under authority," and in 1711 Governor Hunter went so far as to seize all the copies of a representation by the popular Assembly.

But by December 10, 1719 when Governor Shute ordered one printer not to print a remonstrance by the House, another one did and was not punished. This practically ended the censorship, though Shute tried to assert one again in 1721 only to meet with a long and defiant "Answer" by the House. In 1725 papers were ordered to drop "Published by Authority" because they were not under the control of authority. Five years later the blanket clause of 1686 was omitted from Governor Belcher's instructions. James Franklin was quick to profit by this growing tolerance for free writing, but in 1722 found himself in jail for insinuating that the government of Massachusetts was tolerating piracy.

His sheet the Boston *Courant,* at one time appeared under the name of sixteen-year old Benjamin because its printer had filled it with the radical political views of the young American patriots.

The first real legal bulwark of freedom of the press was secured in New York in 1734 when the principle was established that the jury in libel trials shall judge not only the fact that such a person has actually written or published certain words, but also the law as to whether the words and the whole circumstance of their appearance and application constitute a libel. Previously to that interpreting the law had been the powerful and dangerous privilege of the judge.

John Peter Zenger, publisher of the New York *Journal,* a Whig paper opposed to the Governor's party, printed two satirical political songs. The paper was presented before the Council and copies ordered burned by the sheriff. The grand jury refused to indict Zenger so he was arrested on a warrant from the Council. His two lawyer supporters were promptly disbarred, but they managed to enlist Andrew Hamilton, the greatest advocate of the day. By a masterly appeal to the jury over the head of the judge, he persuaded them that they had the right to determine the law as well as the facts, and they acquitted Zenger. Thus the power of the jury to protect a free press was established in America years before it was asserted in England.[5] "The liberty of the press was secure from assaults and the people became equipped with the most powerful weapon for successfully combatting arbitrary power."[6]

Exemption from the intervention of a Licenser before the act of printing was an important step . . . but it did not at once secure that measure of liberty which is the only true freedom of

[5] Livingstone Rutherford. *The Trial of John Peter Zenger,* and 17 Howard State Trials 675.

[6] *Ibid.* p. 131.

the press—exemption from arbitrary persecution; the benefit of just libel laws; and the acknowledged right of every person to use the press for reasonable discussion of all matters of public concern.[7]

The American press now grew constantly stronger. In 1747 when Governor Clinton of New York forbade the reprinting in the *Gazette* of a remonstrance by the Assembly, the latter declared his act arbitrary and illegal. By 1768 there was practically an untrammelled press, and soon the Massachusetts House declared: "The liberty of the Press is the Bulwark of the liberty of the people."

The first national declaration of the value of the freedom of the press was made by the First Continental Congress in the Address to the Inhabitants of Quebec, October 28, 1774:

> The last right we shall mention regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality and arts in general, in its diffusion of liberal sentiments in the administration of government, its ready communication of thoughts between subjects and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated into more honorable and just modes of conducting affairs.[8]

This reveals that while the Revolutionary fathers recognized the value of the press in spreading knowledge, they were more interested in it as a means of unifying the people and extending their control over government.

The first appearance of the free press ideal in an American constitution was in the rhetorical Article XII of the Virginia Declaration of Rights,—"The freedom of the press is one of the great bulwarks of liberty and can never be restrained but by despotic governments." Most of the other States made similar declarations. Respecting the Federal guarantee, we may note that Charles Pinck-

[7] Clyde A. Duniway. *Freedom of the Press in Massachusetts.* p. 107; Livingstone R. Schuyler. *Liberty of the Press in the American Colonies.*

[8] *Journal of the Continental Congress.* I. p. 108 (edition of 1904).

ney submitted a number of propositions to the Constitutional Convention on August 20, 1787, among them a guarantee that the liberty of the press be inviolably preserved. September 14, Pinckney and Gerry moved a similar declaration, but the motion was lost, Mr. Sherman remarking: "It is unnecessary. The power of Congress does not extend to the Press." Popular demand finally incorporated the guarantee in the First Amendment.

Meaning of Freedom of the Press

The term, freedom of the press, has never had a clear-cut meaning because there has been no objective test. It was not defined in the English Common Law, or the American Constitutions. That it had a widely accepted significance to the popular mind as a natural right both in England and America is proved by the wording of the various guarantees: "Shall not be abridged" . . . "Shall remain inviolate. . . " Cooley says:

> Freedom of press and speech must mean a freedom as large as existed when the Constitution which guarantees it was adopted, and it would not be in the power of the legislature to restrict it.

What did it mean when the Constitution was adopted? There were three interpretations: (1) the narrow legalistic English view read into the new constitutions; (2) the people's view deduced from their struggle to use the press as a political instrument; and (3) the libertarian view that demanded absolute liberty as a result of several centuries of struggle against both Church and State.

The legal view held that the guarantee simply restated the ban against censorships before publication, and was based on Blackstone's famous dictum:

> The liberty of the press is indeed essential to the nature of a free state, but this consists in laying no previous restraints

upon publications, and not in freedom from censure for criminal matter when published.[9]

The platitude of the first clause is cancelled by the second for there is no greater censorship than the fear of being punished for printing what may later be found criminal by prejudiced judge or jury, without objective tests. Yet this limited conception of freedom was widely asserted by judges during the Revolutionary period. The chief justice of Massachusetts approved the idea in 1767:

> Liberty of the Press means no more than a freedom for everything to pass from the press without a license from any authority, but this does not imply the liberty of reviling and calumniating.[10]

Some hints of how authority interpreted freedom may be gathered from current events. The Constitutional Convention sat behind closed doors. No official communique was given out, or reporter admitted. The proceedings were not published until Madison's *Journal* appeared years later. In Pennsylvania the Federalists bought up the short-hand reporter who was to report the Ratifying Convention, suppressed other attempts to issue the debates, and withdrew their subscriptions from every publication that warmly supported the anti-Federalist cause. Congress when formed proceeded as usual by contradiction. The House welcomed reporters from its first sitting, but the Senate did not grant the right to report its proceeding until 1793.[11]

This legal view has maintained itself in the courts until to-day. It was restated by the Supreme Court in Patterson v Colorado (205 *U.S. Reports* 454):

> The main purpose of such constitutional provisions is to prevent all such previous restraints upon publications as had

[9] *Commentaries.* IV, p. 151.

[10] Duniway. *op. cit.* p. 125; Hildreth. *History.* V. p. 166; Roscoe Pound. *Harvard Law Review.* 29: 640-51; Chafee, Z. *Harvard Law Review.* 32: 939-40.

[11] Hudson, Frederick. *History of American Journalism;* Hildreth. *History.* I. p. 414.

been practiced by other governments; and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare.

But we cannot possibly accept this rule as the essence of the freedom for which our forefathers fought so bitterly. It would be an insult to their intelligence and contrary to fact. It assumes that the Revolution added nothing at all to our liberty, and we were mildly content to confirm the disappearance of the censor—who had in fact disappeared in England in 1694 and in the Colonies about 1720. It pretends that none of the repressive common law rules on libel and seditious blasphemy were to be abrogated. It is no compliment to the American people to say they got so excited over incorporating free press guarantees in their constitutions just to be certain to keep out a censor already dead for nearly a hundred years. No, this view was just the ancient attempt of authority to maintain the *status quo*. It was urged to emasculate the free press guarantees, not preserve their revolutionary vigor; and such is the power of the courts over liberty, this legalist quibble has been accepted ever since.

For the most wide-spread ideal of the freedom of the press we must turn to the popular, or political, view. Here was not a matter of legal definition by the Tory Blackstone, but the actual and cherished memory of what the press had achieved in the struggle for liberty. The people recalled that during the bitter pamphleteering of the Revolutionary period there had been a liberty of the press never since equalled in vividness and breadth of opinion. The public had supported against the British in many places that most unlicensed of institutions, a secret revolutionary press. Later the necessity for freedom had been sharpened by the practical need for public discussion in a democracy. Can we imagine they were content merely with the abolition of the censor? No, they were

thinking of an instrument to use, without fear of punishment, for criticism or even abuse of the government and its officers. This liberty was conceived as a political rather than as social function as is shown by its constant association with other political tools—free assemblage and the right of petition. The people could not define what they wanted in legal formulas, but they demanded the removal of all hampering restrictions and threats that muzzled their editors. They wanted the right to voice their opinions of men and measures freely, to seek the passage or repeal of laws, to control their own government, even to urge revolution . . . for they were less alarmed at revolution than we have since become. By 1800 the popular view had taken issue with the legal view that passed and defended the Sedition Law of 1798, and if the defeat of the Federalists in 1800 meant anything, it meant that the people wanted real, not paper, liberty. They repudiated Blackstone as well as John Adams.[12] Alexander Hamilton pointed out this dependence of freedom of the press on popular support in Number 84 of The Federalist papers:

> I contend that whatever has been said about it . . . amounts to nothing. What signifies a declaration that the "liberty of the press shall be inviolably preserved"? What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion? I hold it to be impracticable; and from this I infer that its security whatever fine declarations may be inserted in the Constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and the government. . . And here after all, as I intimated on another occasion, we must seek for the only solid basis of our rights.

The third or libertarian school disagreed sharply with this cynical declaration which would leave freedom to

[12] See Schofield, Henry. *Freedom of the Press in the United States* in "Proceedings of The American Sociological Society," 9: 67; and Chafee, Z. *Freedom of Speech.* Chap. I, p. 1-39, and bibliography. The best contemporary view of this version is in St. George Tucker's edition of *Blackstone's Commentaries.* Appendix G, republished in Schroeder, Theodore. *Constitutional Free Speech Defined and Defended.*

the changing moods of the peopde. It preached the utmost liberty and offered a criterion by which to determine the limits of free speech; to-wit, that the words must have resulted in some overt act capable of inflicting actual and material injury upon some one. They pushed freedom to its logical limit, and connected freedom of the press with the "natural liberty" of thought and speech as part of the doctrine of natural rights.

> Liberty of the Press, therefore, properly understood is the personal liberty of the writer to express his thoughts in this more improved way invented by human ingenuity in the form of the press.[13]

Their view derived from the same source as did the absolute religious liberty of the Virginia statute on toleration. They gave to the liberal instinct of the people a practical rule. This idea that the limit on freedom of speech or press should be set only by an actual overt act was not new. It had been asserted by a long line of distinguished thinkers including John Locke, Montesquieu in his *The Spirit of the Laws* ("Words do not constitute an overt act"), the Rev. Phillip Furneaux, James Madison, and Thomas Jefferson. The latter asserted the principle in the Virginia Statute. "It is time enough for the rightful purpose of Civil Government for its officers to interfere when principles break out into overt acts against peace and good order." (See pages 69 and 70)[14]

This libertarian view was held and preached by brilliant and able men; it influenced the ideas of the people and was their sub-conscious guide when they demanded the liberty guarantees in their Constitutions. It is implied in the original meaning of these guarantees, and

[13] Holt, Francis L. *Libel.* Book I, chap. IV.

[14] For a full discussion of origins of this libertarian view and its influence upon the constitutional guarantees see the entire volume by Theodore Schroeder. *Constitutional Free Speech Defined and Defended,* especially Chap. XX, p. 391-439, and Chap. VIII-XI, p. 89-164.

therefore to understand what freedom of speech and the press meant in 1791 we must examine this idea. The meaning becomes clear if we construe the First Amendment in connection with the Fifth. The latter declares: "No person shall be deprived of life, liberty, or property without due process of law." Now due process of law includes among other things the idea that no man shall be punished excepting for a crime wherein the criteria of guilt have previously been defined and made so certain that a person of average intelligence cannot misconstrue them. But in the case of words no such clear-cut pre-determined objective criteria exist. The tests for criminality have all been subjective, and no man can know in advance what words he will be punished for. Both judge and jury base their conclusions upon their own speculations as to "the dangerous tendency" or the possible "imminent danger" to be attached to the words. These very terms are interchangeable. Words that to one man seem perfectly harmless are viewed by another as likely to produce imminent dangers. The author is then left unprotected under the Fifth amendment and at sea with respect to the meaning of the First. The libertarian then proposes that all psychological tests of words be abandoned and the actual and material injury become the test of the overt act rather than a mere opinion as to the problematical effect of words upon a hypothetical person. This keeps liberty an objective fact, and not a mere ideal intellectual concept. The libertarian agitators held, and the people in general agreed, that our Constitutions had resolved the conflict between the tendency test and the overt act test in favor of the later, and had overthrown the Blackstone argument. The people asserted their faith in the new doctrine by repudiating the Sedition act in 1800; in 1837 Congress also refused to bar Abolitionist periodicals from the mail

in Southern States on the ground of their dangerous tendency. But in spite of this, the courts have clung to the test by psychologic tendency regardless of the Constitution.

In practice then in 1791 freedom of the press meant the personal right of any individual to own and print from a private press without previous governmental control; but this theoretical liberty was variously restricted by laws prescribing punishments for the actual publication of matter injurious to private persons or public morals. The term applied of course to the press as an instrument and not to the figurative newspaper "press" although the latter had replaced books and pamphlets as an object of attack because of the obvious dangers in its large audience and swift spread. Cooley gives the best standard legal definition:

> The right to freely utter and publish whatever the citizen may please and to be protected against responsibility for so doing except in so far as such publications for their blasphemy, obscenity, or scandalous character may be a public offense, or as by their falsehood and malice may injuriously affect the standing, reputation, or pecuniary interest of individuals.

To this we must add that all procedure was in favor of authority in which resided a vast dread of "licentiousness" and that "dangerous tendency" was the test for the general crimes specified in the definition.

Practically all the States now provide guarantees of a free press, and often add specific protections: on the one hand insuring that the publisher be responsible for injury done any person, and on the other granting him in libel cases the right to urge the truth as a complete defence, and to have the jury decide on the nature of the words as well as the fact of publication.[15]

[15] Cooley. *Constitutional Limitations.* p. 512, 515, note, and 519; Stevens. *Sources of the Constitution.* p. 219; Hildreth. *History.* II, p. 298.

In 1791 there was no censorship under the general police power; and for forty-five years no thought arose of employing the postal function of the Federal government to control the press by a denial to proscribed publications of facilities for distribution. Later this was done. The clauses in the Constitution on which it is based are:

> The Congress shall have the power to establish post-offices and post-roads . . . . to make all laws which shall be necessary and proper for the carrying into execution of the foregoing powers.[16]

With the later declaration of a national monopoly in postal services, the government gained control of the distribution of all printed matter by post. On this was erected a censorship that had not even been conceived of in 1791. Indeed, Madison said naively in Number 42 of The Federalist papers: "The power of establishing post-roads must, in every view, be a harmless power, and may perhaps, by judicious management become productive of great public conveniency." So the Post-Office was at first regarded as an extension of the private rights of the individual which he had entrusted to the government simply for convenience and efficiency. The only rules respecting the contents of the mails dealt with size, weight, sealing and the like. What a man put into a newspaper was his own affair. The framers of the Constitution did not dream that this innocent-looking service might come, by the growth of the importance of communication and the extension of the state's police powers, to be the censor of both public and private morals. Freedom of the press meant in this first day then the right for your paper to be freely distributed by the posts without question as to contents. The first Amendment, by and large, meant the right to say or print anything a

[16] Article I, section 8, clauses VII and XVIII.

man wanted, with due regard for the damage he might do to other persons. It has never been interpreted in this light.

CHAPTER VIII

FREEDOM OF ASSEMBLY AND RIGHT OF PETITION

Congress shall pass no law . . . abridging the right of the people peaceably to assemble and to petition the government for a redress of grievances.

First Amendment to the Constitution.

The right of peaceful assembly was a traditional right of English freemen. The idea of meetings was the origin of all Teutonic social organizations. It scarcely required a constitutional sanction. So in the first United States Congress a discussion of the proposed Bill of Rights amendment was declared beneath the dignity of the members.

If people freely converse together they must assemble for that purpose. It is a self-evident, inalienable right which the people possess. It is derogatory to the dignity of the House to descend to such minutiae.[1]

The States guaranteed the right in their first Bills and still do.

In all the States except Minnesota and Virginia, the Constitution declares that the people have the right to assemble peaceably, consult together and petition the legislature for the redress of grievances; to instruct their representatives; and for "other proper purposes" . . . In North Carolina secret political societies are declared dangerous and should not be tolerated.[2]

But the right of assembly is more easily assumed than protected. Its simple origin is the social instinct of the people to come together to talk over troubles and seek

[1] *Annals of Congress.* I, p. 731.
[2] Stimson. *Constitutions.*

a plan of common action. In England no other guarantee but the obvious necessity of doing this is needed. There, assemblying is perfectly normal up to the point defined by concrete law where it endangers the community. The basic idea everywhere is that assemblying may be for any purpose, public or private, religious or political, organized and advertised, or spontaneous. The very existence of any constitution at all shows that the people had a prior right to assemble, and this the Constitution cannot take away. The Federal Constitution itself was written by a little group of wilful men who took it upon themselves to assemble semi-secretly. The Supreme Court has said:

> The right of the people peaceably to assemble existed long before the adoption of the Constitution. . . In fact it has always been one of the attributes of citizenship under a free government. It "derives its source," to use the language of Chief Justice Marshall in Gibbons v Ogden (9 Wheaton 1), from those laws whose authority is acknowledged by civilized man throughout the world. It is found wherever civilization exists . . . The government of the United States found it in existence with the obligation on the part of the States to afford it protection. . . The right was not created by the Amendment; neither was its continuance guaranteed, except as against Congressional interference. For their protection in the enjoyment, therefore, the people must look to the States. . . But the right to assemble for petitioning Congress or anything else connected with the national government is an attribute of national citizenship, and as such under the protection of and guarantee by the United States.[3]

In the formal guarantee the single limitation is that assemblies be peaceable. This meant primarily without arms. Military gatherings, contemplating force other than the State's own troops, are clearly too dangerous to be countenanced. Second, it implied no breach of the peace by riot or assault or any resistance to authority. The members must not fight among themselves or against any outsiders.

[3] United States v Cruikshank, 92 *United States Reports* 552.

Individuals in Public Assembly must not invade the rights of private property—i.e., commit a trespass; they must not interfere with the convenience of the public—i.e., create a nuisance.[4]

These probably exhausted the original limitations on the right.

What did the guarantee mean in 1791? It meant the protection of orderly public gatherings to discuss political and religious matters, especially the conduct of the government, its officers and laws, or even its fundamental form. The Founders doubtless had in mind primarily *public* meetings. Private meetings, of stockholders, say, were generally safe without a constitutional guarantee. They wanted freedom for meetings in public places, open to the public generally and concerned with public affairs. The first Congress must have had in mind the outlawing of public meetings in Old and New England and the banning and dispersing of religious gatherings, as of Papists, Dissenters, Quakers, and others both in England and the Colonies. They certainly had in mind their own Revolution.

They expected to protect not debating societies but radical meetings of the kind in which they had been trained. They were accustomed to revolutionary public meetings; they expected to criticize their own government for they keenly felt it was their own to be dealt with as they liked, and possibly abandoned in favor of some improvement. What meaning has the guarantee unless it protects protest meetings? The milder kinds do not need protection. The Founders felt that no meeting should be challenged unless for some overt act, the actual breaking of a law. The guarantee put no limits on the subjects to be discussed, but was doubtless conceived as granting the fullest liberty. There was no thought of

[4] Dicey, A. V. *Law of the Constitution.* Note V, on "Questions Connected with the Right of Public Meeting."

restricting freedom by forbidding attacks upon the government or its officials, or banning propaganda for the overthrow of any political, economic, or religious system. Nor was there any desire as there is to-day to judge of dangers to the public peace by the "tendency" of the meeting or some *possible* effect upon the hearers. The peace to be preserved was the actual present public order. The notion that meetings were to be dispersed for fear of some incitement to crime or of the formation of a criminal conspiracy were added legalistic checks of later years. The Revolutionary Fathers had no hazy ideas of "constructive crime" for they knew too much of real crime! The doctrine of "constructive crime" based on some hypothetical "tendency" arose as the word "peaceable" began to be confused with "legal" or "permissible." This was not its original meaning but a refinement of later judicial interpretation as the police power was extended to meet what were conceived of as the new dangers arising from the complicated machinery of urban life, speedy communication through instant newspaper publicity, and the immediate reaction of the public to suggestions that might affect their morale.

This is not mere speculation. Read what the Fathers thought of freedom of assembly in the Constitution of Delaware, drawn in 1792, article XVI of the Bill of Rights:

> Although disobedience to the law by a part of the people, upon suggestion of impolicy or injustice, in them tends by immediate effect and the influence of example not only to endanger the public safety, but also in government of a republican form contravenes the social principle of such governments, founded on common consent for common good, yet the citizens have a right, in an orderly manner to meet together and to apply to persons intrusted with the powers of government for redress of grievances, or other proper purposes, by petition, remonstrance, or address.

The dangers of freedom are here explicitly recognized. First is the danger from the meeting itself; then the dangers of criticism, perhaps that defiance of the government which has since been labelled "constructive crime" and punished; and lastly the danger in the refusal of the minority to acquiesce in the will of the majority as expressed at the polls—a danger in which lurks rebellion itself. Nevertheless, the minority still had the right to meet, if orderly, and express itself even by remonstrance. It is clear that if the courts had followed the Constitution of Delaware, no prosecution for sedition could ever have been sustained either in 1798 or 1918. Judge Story summed up the early view on freedom of assemblage very clearly:

> It would seem unnecessary to be provided for in a republican government since it results from the very nature and structure of its institutions. It is impossible that it could be practically denied until the spirit of liberty had wholly disappeared, and the people become so servile and debased as to be unfit to exercise any of the privileges of freemen.[5]

The Right of Petition

The right of petition is an elementary way of approaching the government, and was an ancient and cherished prerogative of Englishmen and later of the American Colonists. Failure to consider Colonial petitions was a principal cause of the American Revolution, and a leading grievance in many Declarations of Rights. To-day only three States ignore the right, and eleven include the right of "petition, address, and remonstrance."[6] Extensions of this right in the initiative, ref-

[5] Story, J. *Commentaries on the Constitution.* III, p. 745, sec. 1849; See also Cooley. *Constitutional Limitations.* p. 427; Lieber, F. *Civil Liberty.* Chap. XII; Ray, Sir Charles E. *Constitutional History of England.* Chap. VII; Stevens. *Sources.* p. 221.

[6] Towles, N. C. *Analysis of the Constitution.* p. 230; Stimson. *op. cit.* p. 147.

erendum, and recall in some States already supplement the older method.

The elementary right of telling a public representative what you desire him to do has rarely been disputed. The denial of liberty has come, generally from the reception and treatment of petitions. The Constitutional guarantees do not provide for any real consideration of petitions or any action upon them. They merely protect the citizen in framing, signing, and presenting them. After that the rules of procedure in legislative assemblies dictate what shall happen.[7] Congress has never refused to recieve petitions, but too often they go the waste basket route. These documents have proved of no great value in securing legislative action, even when the signers reached into the millions as in the case of certain petitions for woman's suffrage. Their value is in the publicity they receive and in the centering of public attention on those to whom the petition is directed. Often a cause is furthered by rejection of its petitions, for this ensures public attention and furthers public education. Lalor's Encyclopedia says:

> Petitions awaken the attention of men, keep ideas alive, countenance those who wish to act, and show public opinion.

[7] See Hinds, Asher W. *Rules of the House of Representatives.*

CHAPTER IX

RIGHTS CONCERNING THE MILITIA

A well regulated Militia, being necessary to the security of a free people, the right of the people to bear Arms, shall not be infringed.

Second Amendment to the Constitution.

The idea of guaranteeing the right to bear arms and to organize a local militia for protection primarily against invasion, but also against oppression by the government or one's neighbors, was based directly upon the experience of the Colonies in the Revolution. The match that touched off that conflagration was the organizing of local minute-men and the storing of arms by the Colonists. The Constitution-makers had themselves taken up arms and doubtless intended this to be a guarantee of the broadest nature, almost of the right of local rebellion. The local militia was the arm of the people, something quite different from a governmental army, and, as they believed, the best basis for national defence. The government army had often been but a mercenary force of the King's. Against this the militia was native and self-justified, the weapon of local justice and self-government.

This original conception has become almost obsolete, since in our system of Federal government the national troops are supposed to be as much the people's as the nation's. Indeed they have come to be looked upon by those in power as more impartial, dependable and efficient than local musters. Yet even now there is a residual distrust of the professional troops and a jealous desire

to keep intact some local and home-ruled forces. True local militia hardly exist to-day, however, since State and Federal forces have been inter-locked in one defensive organism. State forces become overnight a part of the National Army; and it has become the habit for Federal troops to enter a State for police purposes almost automatically when any grave disturbance has arisen. Since the Civil War it is hard to conceive of our present State militia defending local liberty against Federal encroachment. The Altgeld-Cleveland controversy in 1894 is evidence enough.

The phrase "well-regulated" means that the force shall be official and disciplined, not a mob or guerilla band which may arise overnight and vanish next day, without responsibility, identity, officers or official status. The old-time Vigilantes were not of course militia. There can be no unofficial militia separate from the organized public forces.[1] To bear arms meant to possess the ordinary personal small arms either individually or in common, and to carry them publicly. The guarantee also protected the mustering-in of trained-bands, assemblying, and drill. In one State the Courts decided that it protected bearing the weapons only of a soldier. It would scarcely protect the citizen in "keeping" an amored tank, nor has it always seemed to guarantee a militia company the use of artillery or air-planes. But it certainly has seemed to protect the use of machine-guns or even semi-armored trains by the "Pinkerton men" or armed guards at factories and mines.

There have been few interpretations by the courts of the larger aspects of the militia guarantee. In fact, whenever the clause needed interpretation the courts could do little about it. The issue is usually settled by

[1] Dunn v the People, 94 *Illinois Reports* 120 (34 *American State Reports* 213).

the very arms in question. Those who might invoke this guarantee either actually have the arms and so need no protection, or else have been deprived of their arms by a power so superior that any court order would be futile to restore the arms to them. As arbitrators between armed forces, courts do not generally function.

No Quartering of Soldiers

No soldier shall, in time of peace, be quartered in any house without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Third Amendment to the Constitution.

This guarantee, aimed at royal prerogative or feudal right, was born of the still lingering fear of some sort of monarchy in the United States. It was descended from the custom of English kings, especially the Stuarts, of supporting their levies and oppressing the people by quartering troops directly upon the citizens. The events of the American Revolution had emphasized its supposed importance. But in fact in 1791 the need for this guarantee no longer existed in this country. The whole theory and structure of popular democracy made it obsolete. No test case has ever come before the Supreme Court. The guarantee has however been retained in many State constitutions.

In Colorado about 1904 the old quarrel underwent a striking metamorphosis into modern economic terms. The question arose over the payment of large sums of State money for the support of the militia engaged in strike-breaking. It was claimed that these troops were not necessary, or that the Governor of Colorado for political or personal reasons kept them in the field beyond the term of necessity; that they had acted not to serve the people of the State but to protect the mines and mills of private persons; and that in so far as they had been used

to break strikes, they had been used against the people while quartered on the people whose taxes paid their wages and subsistence. This claim received no judicial attention.

Exemption from Military Service

. . . but no person religiously scrupulous shall be compelled to bear arms.

Guarantee proposed for the Second Amendment.

When James Madison offered to Congress the proposed articles for the Federal Bill of Rights, he included the foregoing clause in the militia guarantee of the Second Amendment. The clause was defeated in the House. Strangely enough the chief argument against the proposal was that the Government itself might exclude from the militia men not wanted and so raise a partisan army to prevent some part of the people enjoying the right to arms guaranteed in the first clause of the Amendment.[2]

This issue between the right of the state to enforce military service and the right of the individual to refuse to fight presents the problem of civil liberty in basic form; the life of the state versus the life of the individual and the right of the individual's conscience to dictate how he shall use his life. It was not new in 1791; for as long ago as 1648 the tentative Bill of Rights of the Puritans in England had read:

That the matter of impresting and constraining any of us to serve in the wars is against our freedom. (See page 27)

This is the more impressive as it was drawn up by soldiers in the field. The issue arose in America as early as 1665. In Rhode Island a commission sent out by the King to put the Colony in a "posture of defence" (chiefly against

[2] *Annals of Congress.* I, p. 749, 767.

the Indians) passed a militia law requiring six trainings a year under a heavy penalty. The Quakers refused to obey the order, whereupon—

> The government and Council of Rhode Island, et cetera, passed an order for outlawing the people called Quakers; because they would not bear arms and to seize their estates; but the people in general rose up against these severe orders and would not suffer it.[8]

The tenacity with which the Quakers and later other sects such as the Dunkards and Mennonites clung to the doctrine of pacifism led to the inclusion of an exempting clause in several of the original State constitutions. The New York Bill of Rights (1777), article XI, exempted Quakers on the annual payment of ten pounds; the Constitution of 1821 extended this to all denominations. Article XIII of the New Hampshire Bill (1784) reads: "No conscientiously scrupulous person shall be compelled to bear arms provided he pay an equivalent." But in the Revolution repeated denials by the States of the Quakers' rights of conscience were among the first striking violations of the guarantees of the recently drawn constitutions. The Friends were forced into the Army and their rights to exemption impaired. The problem of the conscientious objector to war became manifestly important. The difficulty was aggravated as always by confusion of conscientious objection with treason, espionage, and trading with the enemy. Washington with his customary hard sense found a solution to the problem presented by the Quakers and in the following tribute to their peace-loving qualities he showed what practical use might be made of them:

> Let the Friends alone for you cannot induce them to fight, for or against us. They are a harmless, peaceable, and industrious people who will produce bread and meat and if they will

[8] *Massachusetts Historical Collections.* V, p. 217.

not sell it to us, we can take it as we need it. We need bread and meat as much as we need soldiers.[4]

This view forced the establishment of the "absolute" position the adherents to which extend their conscientious scruples to a refusal to share in war-making in any way, by labor, taxation, or even non-military services.

The immediate problem in 1789 led the Fathers to consider a guarantee of exemption on religious grounds of which Madison's proposal is evidence. For several of the States had included exemption clauses in their proposals for amendments to the Federal Constitution. Maryland had suggested: "That no person conscientiously scrupulous of bearing arms, in any case, shall be compelled personally to serve as a soldier." Virginia wished that any person "religiously scrupulous" be exempted on employing a substitute, or that the right of exemption be reserved to the States.[5] Clearly there existed a general feeling that religious scruples against war-making should be respected, especially among certain sects whose creed, long practice, and convincing sincerity justified the exception. This suggests the question as to whether or not the exemption of religious pacifists from service as guaranteed by certain of the original State constitutions, and granted in the Civil and World Wars by executive act or statute, does not violate other Constitutional guarantees of equality, and in a sense establish a religious test. Is not such a discrimination in direct contradiction to the guarantee of the non-interference by the State in religious matters as expressed in the First Amendment? Some libertarians claim that this is a religious discrimination to benefit favored Christian sects. They would not, of

[4] Sharpless, Isaac. *Quakers in the Revolution.* Chap. VIII, p. 172 ff. and his *History of the Quaker Government in Pennsylvania.* Vol. II, p. 153-63. Persecutions of the Quakers will be found along with those of the Royalists.

[5] Elliott. *Debates.* III, p. 659.

course, refuse exemption to the sects, but extend it equally to all those scrupulous on non-religious grounds. The Maryland proposal indeed seems to have faced the problem of this conflict, and by the words "in any case" to have indicated that other than religious convictions were to be recognized. The significance of the question was shown in the recent World War when conscientious objectors demanded exemption on humanitarian, international, and political grounds. The proportion of "absolutists" who refused to perform any service whatever under military authority increased. Such arguments were not considered in 1791 when the exemptions, proposed or in force, were to apply only to relief from actual fighting in person. They were usually coupled with provisions for paying a bonus, or an annual license, or providing a substitute. These requirements were, of course, intended to make every man do his share, in some form, and to prevent other conscripts from complaining of unfairness.[6]

[6] For legal discussions of the relations of the individual to the State and Federal military forces, and of conscription see: Houston v Moore, 5 Wheat. I; Martin v Mott, 12 Wheat. 19; Luther v Borden, 7 Howard I; Knoedler v Lane, 45 Penna. Reports 238; and 34 Georgia 27; 39 Alabama 254; 26 Texas 386.

CHAPTER X

THE RIGHT TO LAW

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trials shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as Congress may by Law have directed.

Article III, section ii, clause 3 of the Constitution.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in such cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger: nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb: nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty or property without due process of law: nor shall private property be taken for public use, without just compensation.

Fifth Amendment to the Constitution.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation: to be confronted with the witnesses against him; to have Compulsory process for obtaining witnesses in his favour, and to have the Assistance of Counsel for his defence.

Sixth Amendment to the Constitution.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Eighth Amendment to the Constitution.

These guarantees of protection to the individual whose liberty is threatened for an alleged crime arise mainly from the English Common Law, and were written into the Constitution by the demand of the people. The importance attached to them is proven by the two-fold statement of the right to trial by jury, first in the Consti-

tution proper and second, with more precise detail in the Bill of Rights. These guarantees protect only in Federal cases, but all the State Constitutions contain similar provisions. In some States the whole of the Common Law of England is still guaranteed; in the majority it is declared that the right to jury trial shall "remain inviolate." [1]

The basic intent of these guarantees is clear from their words, but the actual application of the "law of the land" or "due process of law" depends upon an intricate heritage of definitions, statutes, and decisions. In a Federal trial for example, the jury must consist of twelve jurors who must render a unanimous verdict: but in some States in certain kinds of cases the jury may consist of less than twelve, or the verdict may be rendered by some major part of its members. It is not possible here to detail the mass of legal technique which determines in practice the meanings of the guarantees. Civil liberty is concerned with a few aspects only; the rest may be studied in the statute-books.

Even definitions of unusual precision change with changing social ideas. What is an "infamous crime" or "a cruel and unusual punishment" or "excessive bail"? A vague public morality interpreted by an individual judge decides the meanings. Since the Fifth Amendment does not define an infamous crime, the arbitrary rule has often been applied that it is a crime punishable by more than a year's imprisonment. Whether or not an indictment is essential depends on this interpretation, and many inroads on liberty have been cloaked by the one-year rule. Speedy and public trials are indeed the rule, but often men have been held more than a year without trial. The courts have assumed some control over the publicity sur-

[1] For details see Stimson. *Federal and State Constitutions.* p. 150, 152, 169, 172.

rounding a trial, regulating the publishing of reports and even excluding the public from hearing some cases of shocking immorality.

What constitutes "due process of law" is a question of vital import to civil liberty. The courts hold that executive acts, duly authorized or implied in the functions of the officer, are due process of law and will not be reviewed by them unless there has been manifest malfeasance. For example, a mere order of the Postmaster General can revoke the second-class mail privilege of a publication, thus depriving the publisher of his property and in effect limiting the liberty of the press. The Secretary of Labor can by an order deport an alien in precisely the same way.[2]

The matter of cruel and unusual punishments is largely one of current sentiments among the people. The guarantee is vague, for manifestly a very unusual punishment for 1800 may now be regarded as socially helpful. And whipping which was then common enough has now become taboo. The United States did not abolish the whipping-post and pillory until 1839. (5 *United States Statutes at Large. Chap.* 36, *sec.* 5). Whipping for wife-beaters still exists in Delaware: and the whipping of Negroes is not uncommon in the South. Judicially, it is decided that whipping is not a cruel and unusual punishment though it is now commonly so regarded. When electrocution was substituted for hanging (largely for humane reasons) it was attacked as "cruel and unusual."[3]

[2] McGehee, L. P. *Due Process of Law.* Introduction and p. 192; Stevens. *Sources.* p. 330; Taylor. *Origins.* p. 235-40.

[3] See Freund, E. *Police Power.* Sec. 101 for a discussion of the right to inflict penal punishment during imprisonment. The Supreme Court of the United States has held that the guarantee might not protect against what could be deemed cruel and unusual punishments if fixed by the legislature, provided they were legally enacted. Weems v the United States.

The clause against excessive bail arose out of English injustices, chiefly under the Stuart governments. The amendment is an exact transcript of the clause in the Bill of Rights of 1688. It means little in effect except to curtail arbitrary action by a judge, and to indicate generally accepted amounts of bail for different crimes, which are frequently changed in specific cases for various reasons. In the long run we have only the restraint of public opinion or professional standards.

To sum up, we find again that civil liberty resides not in written guarantee but in the temper and public spirit of the time. Our protection is the average public opinion, and it has little sanctity beyond this. The guarantees despite their imposing legal formality are not fixed ideas; they merely strike rough balances among conflicting ideas of self-preservation, of right, of selfishness and of social justice, as held by the masses of the people.

The Writ of Habeas Corpus

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the Public Safety may require it.

Article I, section ix, clause 2 of the Constitution.

The writ of habeas corpus is the basic protection of personal liberty. The principle of protecting a man's body against unlawful restraint has existed in the English Common Law for centuries, even before its first historic enunciation in Chapter 39 of Magna Carta. It finally took permanent form in England in the famous Habeas Corpus Act of May 26, 1679 (31 *Charles II chapter* 2). The passage of the act had that humbling touch of irony with which men's most momentous achievements are tempered; for one of the tellers in the House of Lords took advantage of the somewhat befuddled condition of his opposition colleague to count a very fat lord as ten

votes, in jest; and on seeing that the slip was not corrected he tallied this number and passed the bill.[4]

The right to the writ was gradually claimed by the American Colonies under the Common Law. But until late in their history the Colonists depended chiefly on local bail and trial laws. Indeed the claim to the right was one element in the struggle between the Colonies and the Crown. For example, the Habeas Corpus Act passed by Massachusetts in 1692 was later repealed by the Privy Council. Nevertheless, South Carolina was granted a law enforcing the English Act in 1692; and in 1710 Queen Anne extended its benefits to Virginia through instructions to the Governor. In 1736 the Act was formally enforced in Virginia.[5]

The writ is not mentioned in the Declaration of Independence or Articles of Confederation; but beginning in 1776 the State Constitutions recognize it as a limitation on the executive. The 1777 New York Constitution provided:

> The writ of habeas corpus shall be enjoyed in the most free, easy, cheap, expeditious and ample manner, and shall not be suspended by the legislature except in the most urgent and pressing occasions and for a limited time, not exceeding twelve months.

Since then the guarantee has become a part of practically every American State constitution. Their provisions are summarized thus:

> By most States the writ can only be suspended as provided in the Federal Constitution. In others it can never be suspended. The writ can only be suspended by the legislature in nine; while in others this is implied and is a general constitutional principle.[6]

[4] The present English form of the right is in 3 British Statutes 1397. For history of the writ see Church, W. S. *Habeas Corpus.* Chap. I; Hallam, George. *Constitutional Law.* III, p. 19; Blackstone, William. *Commentaries.* III, Chap. i.

[5] *Henings Statutes.* I, p. 305. See Church. *op. cit.* p. 35 and the interesting study, *The Habeas Corpus in the American Colonies* in the *American Historical Review.* 8: 18.

[6] Stimson. *op. cit.* p. 166.

Force was given to the Federal guarantee by the Judiciary Act of September 24, 1789 in the clause: "That all the aforesaid courts of the United States shall have the power to issue the writs of *scire facias, habeas corpus,* [et cetera] . . . and all other writs not especially provided by the statute which may be necessary for their respective jurisdictions." [7]

The meaning of the guarantee is not hard to determine, for its provisions are practically uniform and in effect an extension to American citizens of the benefits of the English Act. [8]

Its foundation is the protection of liberty of the person, which according to Blackstone, consists in "the power of locomotion, or changing situation, or moving one's person to whatsoever place one's inclinations may direct, without imprisonment or restraint without due course of law." The Supreme Court declared: "The intent in respect of the writ is manifest; it is that every citizen may be protected by judicial action from unlawful imprisonment." [9]

The writ of *habeas corpus ad subjiciendum* is a summary order issued by a court and directed to a person detaining another, such as a sheriff or jailer, commanding him to produce at a certain time and place the body of him who is detained. The writ is declared returnable at this time and place. The return when made must state the time and reason for the detention. On production of the body before the court, the judge after a hearing determines the legal status of the prisoner; and he who holds the body must do whatever the court shall deter-

[7] *I United States Statutes at Large,* section xiv, 81.

[8] An abstract of the English Act may be found in Cooley. *Constitutional Limitations.* p. 421 where he says "all subsequent legislation . . . has consisted in little more than a re-enactment of its essential provisions." The complete text may be studied in Hill, Mable. *Literary Documents;* or Hurd. *Writ of Habeas Corpus.*

[9] Ex Parte Yeager, 8 *Wallace's Reports* 85.

mine. The petitioner may be dismissed from custody as having committed no legal offence, or as being illegally held; he may be admitted to bail for future trial; or he may be remanded to the custody in which he was being held.[10]

The writ secures to any man a legal investigation of his imprisonment. It can be applied for by the person detained, by counsel, or by any other person. But some probable cause must be shown for the issuance of the writ. It is a writ of right,—that is, it must issue automatically on a showing of cause and not at the discretion of the judge. To prevent abuses such as arose from the denial of the writ when the courts were not in session, the writ may also be issued by any judge in chambers. It is the final protection of that personal liberty which is essential to all other liberties, and is invoked in all cases of imprisonment for whatever cause or under whatever pretense. In most cases the writ must be secured from State courts since the protection of personal liberty is entrusted to State authorities. But Federal courts of course issue the writ where the detention is under federal authority or where it becomes necessary to enforce some right or authority under the Constitution or laws of the United States.

The meaning of this historic writ is so clear that only one fundamental issue has arisen in applying the guarantee. When and by whom may the privilege of the writ be suspended? As suspension implies the substitution of some sort of executive—frequently military—control for the judicial processes of government, two further important questions have arisen: first, when and where does the proclamation of martial law justify the suspen-

[10] The legal grounds for restrictions on personal liberty are: to prevent crime; to punish crime committed; to punish contempts of court or legislature or to render their jurisdiction effectual; to enforce the citizen's duty in defense of the state; to protect against acts of the mentally infirm. Cooley. *op. cit.* p. 421, and all of chapter IX and X.

sion of the privilege of the writ; second, have the courts power to issue the writ against the military authorities?

Against Unreasonable Search and Seizure

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
>
> *Fourth Amendment to the Constitution.*

The origin of this guarantee is found in the laws passed in England against "general warrants" after the Wilkes case in 1763. General warrants are those that do not name the person to be seized: practically they are *cartes blanches* for seizing anyone and everyone. In this celebrated case, warrants were issued for the unnamed persons concerned in writing, printing, and publishing "Number 45" of the "North Briton." Messengers were sent out armed with warrants so broad, declared Wilkes as to "be against the English people." The "Writs of Assistance" issued in America before the Revolution for the same general purposes held the same dangers to liberty. They were fresh in the minds of the constitution-makers. The general principle is clear in the words of the amendment. "It is little more than the affirmance of a great constitutional doctrine of common law, due to the general warrants of the Revolution," declares Cooley.

Protection against arbitrary searches is based on the ancient English principle "that every man's house is his castle"—eloquently expressed by Chatham in his speech on general warrants:

> The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail, its roof may shake; the wind may blow through it; the storm may enter; but the king

of England may not enter; all his forces dare not cross the threshhold of the ruined tenement.[11]

This guarantee is found in all the State constitutions except that of New York.

The precise legal technique and procedure in search and seizure, are fixed by various statutory enactments. These cover the definition of probable cause; the nature of the affidavit required; subsequent protection of and disposition of seized matter; use to which it can be put in criminal cases; the nature of the police power of forcible entry, and other matters. It should be noted clearly that the constitutions do not forbid all arrests without warrants, or all searches and seizures. The police power justifies arrests demanded by public safety; and search that is of the same general nature and so not "unreasonable." To enter a murderer's home and search it and seize both him and his weapon,—this clearly is not forbidden by any constitution.[12]

[11] Cooley. *Consitutional Limitations.* p. 365, 368, 425; Lieber. *Civil Liberty.* Chap. VI, p. 62 ff.; Stevens. *Sources.* p. 226; May. *Constitutional History of England.* Chap. II; *Jefferson Correspondence.* IV, p. 149.

[12] Freund. *Police Power.* Sec 88. (3) Ibid, sec. 48; also Boyd v United States, 116 U.S. 616; *The Green Bag,* XVIII, p. 273, on "Arbitrary Searches." Of importance for civil liberty is the decision that sealed letters in the United States mail are protected by the Amendment against search without a specific warrant, just as they would be in their owner's possession. See Ex Parte Jackson, 98 U.S.

CHAPTER XI

PROTECTION AGAINST CHARGES OF TREASON

> Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.
>
> *Article III, section 3, clause I of the Constitution.*

The constitutional definition of treason arose out of the danger to the English subject from false charges of treason to the Crown. The charge of treason was so terrible and the penalty so severe that it was not safe to let the king or his government decide what constituted treason to themselves. The people needed an enduring rule above party struggles. The original definition is that of the English statutes, 25 Edward III. The version in the Federal Constitution is taken from the Treason Trials Act of 1696 (7 and 8 William III, c. 3) which required an overt act and two witnesses.

The value to liberty of the definition of treason is supreme. Montesquieu says: "If the crime of treason be indeterminate, that alone is sufficient to make any government degenerate into arbitrary power." The purpose of the guarantee is thus stated by its defenders in *The Federalist,* XXXIII:

> As new-fangled and artificial treasons have been the great engines by which violent factions, the natural off-springs of free government, have usually wreaked their alternate malignity on each other, the convention have, with great judgment, opposed a barrier to this peculiar danger, by inserting a constitutional definition of the crime, fixing the proof necessary for conviction of it, and restraining the Congress, even in punishing it, from

extending the consequences of guilt beyond the person by its author.[1]

This definition of the crime and the requirements for evidence have acted not only as a protection in trials, but as a preventive even of the charge. Indictments based on treason charges have been rare, and convictions rarer.[2] No temporary majority in power has been able, by statute or otherwise, to brand lesser crimes with the terrible name of "Treason." It must be pointed out, however, that mere speeches formerly punished as treason have in later years been punished more mildly under other names. There has been established a wide field of implied disloyalty under the vague name of "sedition." Here the guarantees of free speech in the First Amendment are neglected, and laws passed defining a kind of verbal treason which it was clearly part of the intention of the treason definition to abolish. Here no overt act is required, nor any proof that the enemy actually gained any aid or comfort from the utterances. If the accused utters words that may have "the tendency" to interfere with the designs of the government then he may be found guilty and punished and the populace will acquiesce thinking that he is guilty of treason though he has had none of the protections of the guarantee. The libertarian believes that the strict enforcement of the free speech guarantees to protect utterances right up to the definition and overt act of the treason clause would do away with the dangers from the vaguely defined statutory crimes of disloyalty and sedition. Treason is the only political crime clearly defined in the Federal Constitution. Similar precision in

[1] See also Blackstone. *Commentaries.* IV, Book 12, Chap. VII; Tucker's *Blackstone.* V, book 4, Appendix, "Concerning Treason," p. 11; for a modern view see Hard, William. "No Traitor," in *The New Republic,* November 24, 1917, p. 95-8.

[2] Cf. United States v The Insurgents, 2 *Dallas* 335; United States v Mitchell, 2 *Dallas* 348; ex Parte Bollman, 4 *Cranch* 75; United States v Aaron Burr, 4 *Cranch* 469.

defining freedom of speech and of the press, and the procedure for suspending the writ of habeas corpus would have rendered great services to civil liberty.[3]

[3] The actual enforcement by Congress of the treason clause may be found in 35 *Statutes at Large,* Chap. 321, p. 1088.

CHAPTER XII

THE RIGHT TO CHANGE THE CONSTITUTION

> Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or on the application of the legislatures of two-thirds of the several States, shall call a convention for the proposing amendments, which in either case shall be valid to all intents and purposes as part of this Constitution, when ratified by the legislatures of three-fourths of the several States, or by convention in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress. . .
>
> *Article V of the Constitution.*

But the right to change the basic law is not commonly regarded as an aspect of civil liberty. But in a large sense the whole of liberty is a process of orderly changes; and of these, changes in the frame of government are profoundly important. As personal liberty is the essential guarantee for the individual, so the right to change the basic law is the essential liberty for associations of citizens. Certainly the denial of that right to a powerful party is likely to be followed by the gravest consequences—rebellion.

Naturally the right to change or even to overthrow the government was asserted throughout the Revolutionary years. It even received constitutional recognition in article X of the New Hampshire Bill of Rights in 1784.

> The people may, and of course ought to reform the old or establish a new government. The doctrine of non-resistance against arbitrary power, and oppression, is absurd, slavish, and destructive of the good and happiness of mankind.

Current and later thought held the same view. Jefferson wrote to Madison in 1787:

I hold that a little rebellion now and then is a good thing and as necessary in the political world as a storm in the physical. . . An observation of this truth would render honest republican governors so mild in their punishments of rebellion as not to discourage them too much. It is a medicine necessary to the sound health of the government.

And to Stephen Smith in 1792:

God forbid that we should ever be twenty years without such a rebellion (Shay's Rebellion). . . What country ever existed a century without a rebellion and what country can preserve its liberties if their rulers are not warned from time to time that their people preserve the spirit of resistance? Let them take arms. The remedy is to set them right as to facts; pardon and pacify them. What signify a few lives but in a century or two? The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants.[1]

Lincoln voiced the same faith in Congress in 1848:

Any people anywhere, being inclined and having the power, have the right to rise and shake off the existing government and form a new one that suits them better. Nor is this right confined to cases in which the whole people of an existing government may choose to exercise it. Any portion of such people that can, may revolutionize.

In both original and later constitutions the States recognize the right of the people to alter their frame of government or to substitute a new one altogether.

There is in most States provision for a general revision of the Constitution by a Convention called for that purpose. . . In some the question of holding such a Convention is regularly submitted to the people at stated times, at a general election.[2]

Many of the States conclude their Bills of Rights with a final guarantee of liberty, a provision as to how and when the people may choose a convention to draw up a new constitution.

The Federal Constitution, however, provided for no such general revision. It was presented as a fixed frame, with possible single amendments through a procedure of

[1] Ford. *Jefferson's Works.* V, p. 44 and 71.
[2] Stimson. *Law of the Constitutions,* p. 356.

glacial slowness. Article V on amending is the only admission that the makers were not wholly convinced that they had erected a model in government to endure forever. They faced of course a natural paradox in any constitution's providing for its own dissolution. And this was reenforced in 1787 by the need of assuming that this new government must last. Had they provided for a later Constitution they might have never made the one they had work! The dubious undertaking must *look* permanent to convince anybody. Or possibly the constitution-makers viewed the right of remaking the Constitution as innate in the people, and so superior to all written permissions that change would be forced by a new convention or even by revolution. It is conceivable that a new instrument could be obtained by repeated and sweeping amendments to the present charter. But the difficulty with which a few actual changes have been made—once only after civil war—indicates no such probability.

In fact all the amending or revising of constitutions in the United States has had little effect on the guarantees of civil liberty. The re-written State charters have rarely weakened previous provisions and have generally enlarged the scope of the guarantees. Oklahoma's Constitution in 1908 provided, for example, that the privilege of the writ of habeas corpus shall *never* be suspended, and that any person charged with contempt of court under an injunction shall enjoy a trial by jury.

The Federal Bill of Rights has never been abridged. Whatever has brought about loss of liberties, was not due to changes in the verbal formulas. The history of all the efforts to amend the Constitution shows little desire either to restrict or to enlarge the original guarantees. Over thirteen hundred resolutions containing over eighteen hundred propositions to amend the Constitution were

offered in Congress during the first century of our national life: but since the first one hundred and twenty-four proposals for the Bill of Rights in 1789, very few have concerned themselves with civil liberty.

> The proposed Amendments of the last century have, however, been directed rather to the increase and protection of personal rights and privileges than to their abridgement. . . There have been (since the adoption of the Bill of Rights) but two attempts to add to the Constitution further guarantees in regard to the rights of the press and of free speech, and of the right of the people to assemble, and to be protected against the military power.[3]

These proposals, in April and December, 1864, were "presented, not with the expectation of their adoption, but rather as an arraignment of the President [Lincoln] and the party in power, and as a protest."

New guarantees were of course added to the Federal Constitution by the Thirteenth, Fourteenth, and Fifteenth Amendments. These abolished slavery and extended the protection of the nation over its citizens as citizens of the United States as well as of the individual States. They were not held by the courts until 1925 to protect the citizen from infringement of his civil liberties by the States themselves. The subsequent amendments have, with the exception of the Eighteenth on prohibition, been liberalizing in tendency and have extended democratic rights and principles. The grant to women of the right to vote might well be considered part of the Bill of Rights. The net result of constitutional change has been that, of all the nineteen amendments fourteen definitely concern civil liberty; and of the other five all except those dealing with the pure technique of government extend the people's powers.

The record seems to show that the people have felt little need of larger constitutional definitions of liberties

[3] Ames, H. V. *Proposed Amendments to the Constitution During the First Century of Its History.* p. 190-2, notes; also p. 19, 186, and 277.

than those in the Bill of Rights; and that the forces making for or against liberty lie not in the written guarantees but in public opinion.

CHAPTER XIII

CONCLUSION

The end of any study of the history and meaning of liberty must be a question: what has this ideal meant in real life? Here the words defining the guarantees are simple enough, and have not been changed. The people who set them into their charters were convinced that they knew what these clauses meant. The Constitution has always been in force, and any proposal to suspend a right has ever alarmed the people into prompt repudiation at the polls. No liberty guarantee has ever been repealed. On the contrary new ones have been added to the national Constitution and the State Bills of Rights have been enlarged by several experimental protections. In form therefore we have enjoyed for one hundred and fifty years exactly the same liberties our Forefathers enjoyed. Here is the nub of the matter. What liberties did they really enjoy? What happened when the guarantees were actually invoked? What has been the procedure by which they have been interpreted and given practical content? Why has never a day dawned in the one hundred and thirty-six years since January 1791 that somewhere in the United States someone was not protesting that his liberty was being restricted, denied, invaded, violated, or lost? Why has no decade passed without one or several organized movements against the rights of minorities.

These are serious questions not to be solved in this brief summary, but also not to be overlooked in any study of the status of our liberty. We must in conclu-

sion point out certain principal factors that govern the translation of liberty from parchments into use.

First, few people care about civil liberty either for themselves or others, and the few who do care, fight for their own liberty and not for the principle. Wherever in our history the issue has been sharply raised it has been raised by some group endeavoring to express itself against opposition, scarcely ever by men who held the creed nobly defined as "the willingness to die for the right of another man to say what you believe false and dangerous." Civil liberty has offered just another field in which factions have contended; and when one side won liberty, it meant not that they had re-established their rights in a permanent covenant but merely summoned enough power to force their opponents to let them do what they wanted.

The birth of the nation proved this; our Forefathers were not abstract libertarians except for the rare philosopher like Jefferson. There was indeed a wide interest in liberty, an interest wider than has ever existed since, but an interest of a very utilitarian kind. The people wanted their liberties; first because they had found them useful in escaping from a tyrant; second because they needed them to run their experiment in government. They sought no new liberty; rather they looked back and their fears led them to adopt outworn English guarantees not needed in a democracy, such as the Third Amendment against the quartering of soldiers on the civil population during peace. No case under this clause has ever risen in America. The founders took no thought to protect one part of the people against another except in religious opinions; or the minority against the majority; or any political movement against the power of the party in control.

These early Americans were realists. Their own indifference to their new Bills of Rights proved this. They granted no unusual liberty to those who dissented from the will of the Revolutionary States. The ink was not dry on the sonorous phrases when they began to persecute their neighbors who wished to remain Englishmen. Nor could the Quaker pacifists of 1778 plead "religious liberty" to save themselves from being drafted into the Continental armies to fight for liberty!

Libertarians on principle have been few and far between, and have generally belonged to three queerly mated groups: the Quakers, the Anarchists, and the lawyers. The Quaker gives obedience to God through his conscience and hence has always demanded freedom from interference by the state. The Anarchist oddly enough holds about the same faith, though he replaces God with some sort of Will-in-Nature, and wants to do away with both state and law. The legalist has evinced a certain professional interest in the principles of liberty, for intellectual pride has demanded that he try to erect his rules into principles. This not ignoble desire for intellectual consistency has sometimes made him appear the chief defender of civil liberty though only within the limits set by other laws and the pressure of his times. His technical concern has rarely made him a protector of real liberty, only a protector of law.

The movement you leave the realm of philosophy or religion for that of action, that moment civil liberty becomes a weapon, not a principle of social evolution. Then we have evolution by struggle, not by conscious design. The Abolitionists, the Catholics, the sex reformers, the workers, all demanded liberty,—but for their own use. Naturally, they refreshed and revived the ideals of liberty but usually as incidental to their own struggle. This is

why so often the minority that has invoked constitutional liberty becomes, when successful, not a defender of liberty, but an oppressor in turn. This also explains why the cry for liberty is rarely heard except during a struggle —a war, strike, religious furore, or race conflict. For civil liberty is most needed in a crisis, when it is generally most lacking.

The second weakness of our American liberties was born with them—the doctrine of natural rights. There are no natural rights; and so to base our liberty upon them is to base it upon nothing. Yet this doctrine was advanced as the source of our freedoms by the Founders and has been set up as a standard of interpretation ever since. There has resulted a kind of metaphysical confusion that has been turned to account by those who wanted to stultify true social liberty. In the forementioned struggles a natural right, even if it could be proven would not amount to a row of pins. What natural rights does one man have in himself? None, unless to think in silence. Society may interfere with everything he can *do*. Can he commit suicide? No, society will stop him if it can. Can he exercise his sexual instinct freely? This would seem as near a natural right as any. But no, sex is the very field in which freedom is denied both by law and public opinion. Has he the right held to be the very base of the compact-natural rights state—to join or leave a society with which he agrees or disagrees? This theory was plausible when the globe still held unchartered lands for escape: but now where has any man a natural right to go? The immigrant denied admission to a new country, or that homeless soul deported from one country and refused admission by all the rest proves that it is not possible to withdraw from society even when both you and society are eager for the separation.

Liberty is in short a social product. That's why you want liberty guarantees, because you are in society. Man never was in a state of nature; he enters society willy-nilly, not by compact, and society precedes governments and constitutions. So if you invoke your natural rights you find you have none, only social privileges: and society grants these not because of natural rights, but because of natural gifts in the individual which may prove useful to it in its progress and adaptation. Natural rights do not exist as a physical or psychological fact in society. Nor can absolute natural rights ever exist in a democracy, for the majority simply votes to define what are your natural rights and how they may be exercised. The Courts of the United States have sometimes talked as if their judgments were based on a philosophy of natural rights but they have not yet let such rights contradict the purposes and orders of the state. This divergence between doctrine and practice has been a constant source of weakness and is only just beginning to be overcome by the modern idea that grants liberty to men not for the sake of their natural rights, but for the sake of the state.

The third reason our liberties have never corresponded to the words of the guarantees is that the words have never been taken literally. They have always been "interpreted" by the courts. And by judicial interpretation you can make a guarantee mean anything or nothing. It has been a question of where a court drew a line—the famous line dividing "liberty" from "license." Yet the word license occurs in no constitution. It is the courts' word. This power of the courts over liberty was not suspected by the people in 1791. They believed that the liberties arose from themselves through the constitutions, and were not to be limited by legislative or judicial interference or executive act. But the event has shown

that the Supreme Court of the United States is the real arbiter of our liberties. It decides what liberties we may enjoy and what punishment we shall suffer for taking liberties that we shouldn't. It decides when and to whom the guarantees apply; it settles conflicts between these parts of the Constitution and others; it asserts the rights of the legislative and executive branches to tamper with liberty.

We venture three observations only with respect to the Supreme Court's interpretation of liberty. It has been tardy; it has been conservative; it has been inconsistent because it never established any basic principles.

The Courts' decisions have generally been so belated as to prove useless. The law's delays may be endured on questions of property or civil matters but they are fatal to liberty, which must be instant and untrammelled. The Court has countenanced all the delays of procedure, urged men to wait and see, played it safe, and even at times been powerless in the face of governmental or public pressure. It has indeed made post-mortem decisions in favor of liberty as in the famous case, Ex-parte Milligan, after the Civil War. Milligan escaped death, but what good did that do him as an agitator against the War—which was then over? Ultimate vindication is of little comfort to the man who is gagged or jailed while his publication is suppressed, his strike broken, or his propaganda ruined. Even the briefest arrest breaks up his plans and brings public disgrace. Moreover fear is a great deterrent, and a single arrest however illegal may cause a thousand other supporters of a movement to keep silent. Nor have these vindications by the courts after a crisis, proved of much aid in the next crisis. We do not seem to make much advance but to need to fight the whole issue out in each successive emergency.

This is due to the second impediment of the Supreme Court as an interpreter of liberty—its essential conservatism and dread of change. The Court is part of the government and therefore starts with its first principle of interpretation thus: The government must be preserved unimpaired. What threatens the government threatens the court and so it resorts to an instinct for self-preservation, personal and even logical. In civil liberty cases the Court is always trying to hoist itself by its own boot straps. The Courts are preservative, not experimental; and anyone who urges change must be alien to the court's sentiments; for these sentiments are governed by rules laid down years or centuries ago. They refer automatically to precedent and tradition. The courts are always behind the times and liberty is always ahead of the times!

The very first interpretations of the liberty guarantees prove this. They declared that the guarantees of freedom of speech and of the press meant nothing new but merely restated the ban against censorship which had actually disappeared in England and the Colonies from fifty to a hundred years before. They went back to Blackstone and the Common Law of England. They could not understand either the Revolution or the new democracy. But they interpreted freedom of the press in terms of seditious libel in England—a crime based upon the idea that anybody who criticized the King or his government must be punished, since any reflection cast upon the divine right monarch was by nature wrong, even blasphemous. The American courts wanted to apply this doctrine to a government that had arisen *by throwing out the king,* where the governors were merely temporarily elected members of the people themselves. They tried to make it seditious for the press of the people to criticize the very servants the people had chosen by their votes!

The fact that there had been an American Revolution did not penetrate the American courts until about 1830—and there be those who maintain this news has not completely penetrated yet.

Next, the Supreme Court is inconsistent. It changes its mind without giving any reason. The true reason is of course that the Court has no basic ideal of liberty to keep its decisions consistent; so its reversals indicate nothing but an enforced acquiescence in a social advance that has left the Court out on the limb of an obsolete doctrine with nothing to do but declare as unostentatiously as possible that what it has always said was "A will hereafter be called B"—until the next reversal. One recent and discouraging example of this inconsistency must be discussed in a little detail since it seems to upset one of the principal foundations of the body of this book.

We have assumed throughout this study that the liberty guarantees of the national Constitution do not protect individuals against invasions of their liberties by the States. This assumption is the outgrowth of facts. The first Senate, considering the Bill of Rights Amendments in 1790, rejected one that guaranteed protection to the individual against state encroachment. This seemed to indicate that the First Congress considered the first ten amendments binding only against the Federal Government. The President has several times refused to intervene to protect minorities whose liberties were being violated by the States. Examples are in the Dorr War in Rhode Island and in the Mormon persecutions in Missouri. More outstanding have been the decisions of the Supreme Court of the United States which has repeatedly ruled that the Federal Rights guarantees protect persons only in their national, not in their state rights.[1] This

[1] The cases of importance are given on page 50 as are references to discussions of this point.

stand has always been taken in the case of the first ten amendments as also in that of the Fourteenth Amendment, though the latter contains the clause: "Nor shall any State deprive any person of life, liberty, or property, without due process of law." For in the case of Maxwell v Dow (176 U.S. Reports 581) the Supreme Court emphasized the doctrine that "the adoption of the fourteenth Amendment had not the effect of making all the provisions contained in the first eight Amendments operative in the State courts. . . on the ground that the fundamental rights protected by these amendments are, by virtue of the Fourteenth Amendment to be regarded as privileges and immunities of the citizens of the United States." The courts have appeared to hold consistently to this doctrine, despite the occasional dissenter, like Justice Harlan and Justice Brandeis. In the Principal Report of the Federal Commission on Industrial Relations of 1915 we find the pertinent comment: "We are informed by counsel who have examined the cases involved that the Fourteenth Amendment has had no appreciable effect in protecting personal rights."

This study assumed therefore by necessity not by choice that if there was one permanent principle in American civil liberty it was this rule one hundred and thirty-five years old: the liberties guaranteed in the Bills of Rights of the Federal Constitution were not guaranteed by the United States to the citizens of the individual states. Now, after this book is written it appears that the Supreme Court has changed its mind. Justice Sanford, in expressing the opinion of the Court in the case of Gitlow v The People of the State of New York, decided June 8, 1925 (268 U.S. Reports 630), says:

> For present purposes we may and do assume that freedom of speech and of the press which are protected by the First Amendment from abridgment by Congress are among the funda-

mental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States.

This may be a salutary change of doctrine for sometimes the inconsistency of courts does prove helpful to liberty. It does seem, however, that the Court owes more to its past than to reverse a basic and established principle in the casual words: "We may and do assume." In the matter of liberty we have a right to ask that the Court should know its mind.

Briefly there are other reasons why the courts are conservative about liberty. The judges derive from the lawyer caste which is none too often libertarian. They are almost by necessity established and successful members of the current society, bound up materially and psychologically with the social and economic system in power. They are generally oldish men with waning emotions. So the Supreme Court of this land is not the aloof and passionless machine for social justice that the unthinking sometimes imagine. In a crisis it shares the emotions and prejudices of the populace and its decisions are likely to prove mere rationalizations of the reactions of the herd mind, tricked out with intellectual phrasing and impressive citations.

But if we turn to the state's influence on liberty, we find that the most extensive and frequent losses of liberty are not due either to court or executive, but to the failure of the force of the government to protect men from violence and mobs. The history of liberty could almost be written in terms of mobs that "got away with it," and were never punished—from the Tory-hunters of 1778 to the Ku Klux Klan of 1927. Yet such protection should be one of the primary undertakings of the state. Of what value are "liberty clauses" if mobs can deny you liberty? The States generally do not assume responsibility for the

work of mobs though laws asserting the obligation to do so exist in some state. A few State Constitutions do, moreover, provide that sheriffs and counties may be held responsible for lynchings. But the States generally have been so lax in their police protection against mob violence that recently strong efforts have been made to secure a national law to permit Federal intervention and punishments.

Since our liberties are not in practice enforced by a spirit of liberty in the people, or by any appeal to natural rights, or by the courts, or by the police, upon what then does liberty depend? In times of strife upon power; in times of quiet, upon indifference. There are exceptions but in the main it is true that they who have power have liberty. This power may be political controlling the government and courts; it may be the coercion of public opinion expressed through laws and through mobs; it may be the economic power that owns political parties and creates public opinion.

Proof is found in every struggle in our history. The Federalists who represented economic power, controlled the government in 1798 and passed the Alien and Sedition Acts. The Republicans appealed to the fears of the people, defeated the Federalists and wiped out these laws in 1801. The slave power held economic sovereignty for thirty years and ruled that Abolitionist papers could not be delivered through the United States post office in any Southern State. In 1860 the anti-slave power got control and suppressed the meetings of their opponents, their papers, and barred their propaganda in Northern States. Mr. Lincoln summed up the matter in his usual pithy way: "I felt that measures otherwise unconstitutional, might become lawful by becoming indispensable to the preservation of the Constitution through the preservation

of the nation." The Mormons were driven out of Missouri and Illinois because they were weak. They migrated to Utah and set up a State that defied the national forces. In our times, according to the radical critique of liberty, the money-power has been able to deny all the constitutional liberties to the workers because it held both economic and political power. It has named the executives and ruled the legislatures. It has denied liberty by devices that ranged from injunctions secured from complaisant judges to mobs inspired by *agents provocateurs.*

In serious struggles the field of civil liberty becomes but one part of the battle wherein the most powerful force will deny its opponents liberty, legally or illegally, through public opinion or in spite of public opinion. Indeed, the economic power is against liberty even when its direct interests are not threatened. For its profits by the continuance of the *status quo* wherein those who have money and power will continue to have them; and so it is prompt to silence the critic and innovator of anything and to invoke public ignorance, prejudices, and inertia to back up its suppressions.

But after the emergency the public and to some degree the holders of power grow indifferent. The issues now seem too unimportant to fight over. The executive, the courts, and the police sink back into normalcy from which they have been prodded by the self-interest of their energetic backers. Civil liberty is taken pretty much for granted. The restrictive law is repealed or ignored or perhaps now declared unconstitutional. The executive's usurpations are cancelled and the persons illegally detained are released. The decisions of lower courts are reversed; the technical rule is waived in favor of an honest decision on the merits of the case; the conflict of

jurisdictions that delayed action for liberty is resolved in favor of one or the other jurisdiction.

In such times constitutional liberty has perhaps its greatest value for it is the educational forces of new ideas that produces social change, not the spectacular struggles that are in fact only symbols of how far the change has gone. Yet liberty is still not safe. Then occurs the slow but steady wearing down of popular rights either through neglect to assert them or the nibbling of judicial interpretation. This occurs in times of profound quiet under governors of presumed benevolence. Frederick Stimson says: "The English people in a thousand years' experience have found that their liberties were never so really in danger as when they knew it least, never so nearly lost as under kings they liked best. . . When a people is unanimous on most of the things we desire, we may carelessly adopt a means that seems to be a short cut though it be destructive in later times, or in other hands, of government by the people itself." [2] And again from others: "Free governments and their constitutions are not prostrated at a blow by the onslaught of tyranny. They are attacked insidiously . . . one right is taken away under one pretense, and another destroyed under another pretense. . . Some great benefit is to be attained; life is to be protected; free government is to be conserved; the common people are to be saved from the heresies of false doctrines. . . Those forces of reaction and despotism are ever skulking along the line of Progress ready for any occasion that may come that will warrant an attack in the name of the very principles under which humanity is marching." [3]

The events of the Presidency of Theodore Roosevelt,

[2] In *The American Constitution.*

[3] Clarence Darrow and Edgar Lee Masters in Brief: *ex rel Williams,* p. 98.

certainly one of our "best-liked kings," and the recent steady extension of the police power over health, morals, and personal habits, give ample evidence of the kind of slow encroachment on liberty here instanced. Indeed, the modern struggle for liberty is at root a fight against the gradual extension of the police power.

The liberal who in recent years has thought we were losing "our ancient liberties" may come to the conclusion that we never had any to lose. He may reach the bitter belief that the United States never has achieved real liberty at any time, and that the first decades were not better than the last. In fact, the first decades were not eras either of complete liberty or complete suppression, but a mixture of both—like all other eras of history. How does liberty in 1927 compare with that in 1791? We do certain things freely now that were forbidden then, but in proportion to the knowledge and social ideals of each period we seem somewhat less free. The degree of liberty must be measured in relation to the general enlightenment of the time. The total field of liberty was smaller, but the individual enjoyed freedom in a larger part of what existed. For example, conscientious objectors were tortured during the Revolution, the Civil War, and the World War; but it was more widely protested as a grave violation of conscience in 1918 than in provincial Pennsylvania in 1778, or slave-holding Carolina in 1861. The question of comparative liberty is academic. What we want always is the maximum of freedom.

Though we find the notion of a guaranteed liberty meaningless, this does not leave "our ancient liberties" valueless. But they have worth as symbols, not as inviolable rules. They define the scope of liberty. They recall that our forefathers so prized these few simple rights that they imbedded them in their fundamental law.

Yet these rights have never lived save as men by their struggles breathed life into them. They have nevertheless for generation after generation set a standard of what freedoms were worth living for—and worth dying for—and they still inspire us to love and defend our own liberty.

Liberty cannot be inherited. It must be won and won fresh for each issue in every generation. Our fathers' liberties are little help to us. The old spirit may free us but never the old words. If we love liberty and fight for it, these guarantees are full of meaning. But if we indolently imagine that liberty descends on us from above, these phrases are vain and deceptive slogans. We have no ancient liberties, only our own! The written words are but memoranda to keep our liberties in our minds. The defenders of liberty prove generally to have been bitter partisans crying the guarantees as war-cries in the heat of battle. The principle of natural rights has authority only as a reminder that the soul of the individual man has in its something of worth, not created by his society. The courts turn out to be not the omniscient interpreters of impartial justice but rather the stimulators of new rebellions. That public opinion from which the judge draws his sanctions and to which we have been told to look for the preservation of our ancient liberty too often reveals itself as but the voice of a herd whose will it is to crucify, then sanctify, its saviors. Yet, if with such frail liberties we have come thus far; if so many men have died for their ideas, and these ideas somehow come true, shall we not cherish what liberties we have and learn to make them greater?

INDEX

Adams, John, 33-4, 58, 94
Adams, Samuel, 21, 34, 38
"Agreement of the colonists," 32
"Agreement of the people of England," 26-7
American contributions, (chapter), 23-36
Ames, Herman V., 49-50, 132
Arrest, 123, 140
Articles of confederation, contain no guarantees, 45
Assembly, Freedom of, 101-5

Bail, 118
Beard, Charles A., 56, 57, (footnote) 46
Berkeley, Sir William, 87
Bills of rights, (chapter) 37-51, 80; English, 19, 27, 110
Blackstone, Sir William, as interpreter of liberty, 68; on censorship, 91-2, 96; on personal liberty, 120
Blasphemy, 82, 83
Borgeaud, Charles, (footnotes) 24, 25, 30, 31
Boston, "Declarations of rights," 37-8
Boylston, Nabdiel, 67
Brandeis, Louis D., on free speech, 3-6
Brown, Justice, 22
Browne, Robert, 25
Bryce, James, 43

Censorship, 86-7; postal, 98-9
Chatham, William Pitt, 1st earl of, 122-3
Chief Justice of Massachusetts, 92
Christian ideal back of constitutions, 55-6
Christian nation, 76-7
Christianity and toleration, 66
Church separated from state, 72, 74-5
Churches, State, 68
Civil liberty, 110, 132, 136, 137-8, 141, 143, 146; abstract, 53; defined (chapter), 7-15; list of constitutional guarantees, 13
Cobb, Sanford H., 69, 74, (footnote) 63
Colonial governors' power over the press, 87-90
Colorado militia in strike-breaking, 109-10
"Committees of correspondence and safety," 60
Common law, 57-9, 80, 91, 93
Compact-state doctrine, 30-5
Congregationalism and civil liberty, 25-6
Congress, right to report proceedings, 92
Connecticut, Fundamental orders of, 32-3
Conscientious objectors, 111-13, 148
Constitution of the United States, amendments, 131-3; amendments clause, 129, 131; bill of rights amendments, 46-51; purposes, 55; references to religion, 70-2; religious liberty, 63; right to change, (chapter) 129-33; treason clause, 125; underlying ideals (chapter) 53-61
Constitutional convention, 46-8, 92
Constitutions, Provision for change of, 130-1
Continental congress "Address to the inhabitants of Quebec," 39, 68, 90; "Declaration of rights and liberties," 38; "Ordinance for the government of the Northwest territory," 45-6
Cooley, Thomas M., 72, 76, 85-6, 91, 97, 122, (footnote) 121
Courant (newspaper), 89
Courts, interpretation of liberty, 139
Crime, Infamous, defined, 116

Darrow, Clarence, 147
Declaration of independence, 21, 44-5
Delaware constitution, clause on freedom of assembly, 104
Dicey, Albert V., 19, 103
Dissenter, 11
Due process of law, 96, 117, 143
Duniway, Clyde A., 89-90
Dunster, Henry, 28, 64
Dyer, Mary, 67

English bill of rights. *See* Bills of rights, English
English liberty charters, 20
English origins, (chapter) 17-22

Federal relations to states, guarantees not enforced, 50, 142-3; army v. militia, 107-8
Federalist on treason, 125-6
Federalists deny free press in Pennsylvania, 92
Fiske, John, 61, (footnote) 20
Fox, George, 86
Franklin, Benjamin, 67
Franklin, James, 88-9
"Free speech defined and defended," by T. A. Schroeder, 73
Freedom of communication, 79
Freedom of contract, 14
Freedom of speech, 79-85; Brandeis, L. D., quoted, 3-6; limitations, 80-4, 95; value, 85
Freedom of the press, 85-90, 141; (meaning) 91-9; revolutionary period, 93; theoretical, 97
Freedoms, defined, 10-12, 14
Freund, Ernst, 73, (footnotes) 8, 9, 10
Furneaux, Phillip, 95

Georgia charter, liberty of conscience clause, 66
Gerry, Elbridge, 46-7, 91
Guarantees of liberty, 45, 135, 139, 141, 142, 149

Habeas corpus, 118-22
Hamilton, Alexander, 42, 47-8, 59, 94
Hamilton, Andrew, 89
Holt, Francis L., 95
Hooker, Richard, 32

Jameson, John F., (footnote) 18
Jefferson, Thomas, 3, 29, 67, 69, 95, 129-30, (footnote) 4
Jellinek, Georg, 77-8, (footnotes) 19-20, 23, 24, 46
Judges, conservatism, 144

Kent, James, 78

Law's delays, 140
Lawyers and liberty, viii, 137
Levellers, 26
Libel acts, English, 86
Libel and slander, 81-3, 97
Libel trials, New York, 89
Libertarian school, 94-6
Libertarians, 94, 137
Liberty, Brandeis, L. D., quoted, 3-6; constitutional guarantees, 1, 2, 13-14, 95; ideals, 135, 137; social, 14; traditional, 18. *See also* Civil liberty, Guarantees of liberty, Religious liberty, Religious origin of liberty
Liberty of the press. *See* Freedom of the press
License, 80, 139
Lieber, Francis, 7
Lilburne, John, 26, 87
Lincoln, Abraham, 130, 145-6
Locke, John, 95

Mack, Julian W., (introduction) 1-5
Madison, James, 49-50, 68, 92, 95, 98, 110
Majority rule, 59-60; tyranny of, 85
Maryland bill of rights, 42
Maryland toleration act, 64-5, 73
Mason, George, 37, 39, 46
Massachusetts Resolves, 37
Masters, Edgar L., 147
Mather, Cotton, 67
Maule, Thomas, 87
Mayflower Pilgrims, compact, 32
Military service, Exemption from, 110-13; religious exemption discriminatory, 112
Militia, rights, (chapter) 107-13
Mill, John S., 9-10
Milligan case, 140
Milton, John, 28, 86
Mob violence, 12, 60, 144-5
Montesquieu, Baron de, 95, 125
Morals, Public, 83, 97

Natural rights, 23, 28, 34, 138-9; definition, 29-30
New Hampshire bill of rights, 129
New York bill of rights, liberty of conscience clause, 73
New York (state) constitution, 119

Obscenity, 82, 83
Ohio constitution, 56
Otis, James, 37
Overt act v. tendency test, 4, 5, 83, 95, 96

Paine, Thomas, 72
Penn, William, 66
People-compact, 31
Personal liberty, 13-14, 143
Petition, Right of, 105-6
Pinckney, Charles, 90-1
Police power, 84, 98, 123, 148
Postal censorship, 98-9
Pound, Roscoe, 8
Power and liberty, 145
Private property, 56-7
Public opinion, 133, 149
Public speech, 84-5
Publick occurrences (newspaper), 88
Punishments, Cruel and unusual, 117
Puritan army, Constitution, 26-7
Puritan liberty, 24-8
Puritans, American, 28-36

Quakers, exemption from military service, 111; persecutions, 67, 137

Reinsch, Charles S., 57-8
Religion and state. *See* State and religion
Religious liberty, 55-6, (chapter) 63-78; in England, 27; in Rhode Island, 33
Religious origin of liberty, 24, 25
Revolution, 22; causes, 88, 105
Rhode Island (colony) militia law, 110-11
Rhode Island charter, religious liberty clause, 65-6, 73
Right to learn, 14
Rights, 10-11, 13, 20, 23
"Rights of the British colonists," 37
Roosevelt, Theodore, 147

Sanford, Edward T., 143-4
Schroeder, Theodore A., 73
Scott, Eben G., 77
Scrutton, Sir Thomas E., (footnote) 5
Search and seizure, 122-3
Sedition, 82-3, 126
Sherman, Roger, 91
Slander. *See* Libel and slander
Social privileges, 139
Soldiers, Quartering, 109-10, 136
Speech. *See* Freedom of speech; Public speech; Words
Spencer, Herbert, 71
Stamp act congress, 37
Star chamber, 86
State and religion, 73-7
State bills of rights, 39-44
State churches, 68
State protection against violence, 8, 12, 84
State violations of liberty, 50, 142-3
Stevens, Charles E., (footnote) 21
Stimson, Frederick J., 15, 22, 47, 119, 130, 147, (footnote) 70
Story, Joseph, 42-3, 76, 105
Supreme court of the United States, arbiter of liberties, 140; conservatism, 141; decisions, 144; habeas corpus, 120; inconsistency, 142; legal view on publications, 92-3; quoted on right of assembly, 102

Taylor, Hannis, (footnotes) 20, 38
Toleration, Religious, 64-78
Treason, 125-7
Trial by jury, 115-16

United States. Constitution. *See* Constitution of the United States

Virginia "Declaration of rights," 39-42, 68-9, 90
Virginia statute for religious liberty, 69-70

Washington, George, 111-12
Whipple, Leon, 2-3
Williams, Roger, 35, 64
Wilkes case, 122
Willoughby, Westel W., (footnote) 61
Wilson, James, 47
Words, criteria, 96; uses, 83
"Writs of assistance," 122
Wyse, John, 33

Zenger, John P., 89

BENEDICTINE UNIVERSITY LIBRARY
323.44W570 C001
OUR ANCIENT LIBERTIES NEW YORK
3 2811 00022 4578
C0-AEW-342